

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL ) NO. 1:18-CV-68  
)  
)  
VS. ) Houston, Texas  
) 10:00 a.m.  
)  
UNITED STATES OF AMERICA, ET ) AUGUST 8, 2018  
AL )

\*\*\*\*\*

HEARING

BEFORE THE HONORABLE ANDREW S. HANEN

UNITED STATES DISTRICT JUDGE

VOLUME 1 OF 1

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## 1 P R O C E E D I N G S

2 (Court called to order.)

3 THE COURT: Thank you. Be seated. All right.  
4 Good morning. We are here in B-18-68, Texas, et al vs.  
09:58:13 5 United States, et al.

6 Before we start there are a couple of  
7 things I would like to go over. First of all, I think  
8 everybody here knows this is an important case for the  
9 parties, and for the states, and for the nation. And as  
09:58:28 10 such, I expect everyone to give due deference, and adopt  
11 a -- at least a degree of decorum that is fitting of such  
12 an important issue.

13 Secondly, let me say no one in this case  
14 is a bad guy. Plaintiff States are trying to protect what  
09:58:49 15 they think are their best interests. The government is  
16 trying to develop an effective immigration policy and  
17 border security policy.

18 The intervenors are 22 individuals of very  
19 good character that are just trying to, you know, live the  
09:59:07 20 best life they possibly can. And the state of New Jersey  
21 is trying to do what it thinks is the best for their  
22 individuals and their state.

23 So, there isn't a bad guy in this case,  
24 and the reason I am -- I am leading up to this, is because,  
09:59:24 25 you know, reasonable people can view the same things

1 reasonably; and as lawyers and judges, we're trained to  
2 disagree but in a nice manner. You can be -- you can  
3 disagree on the facts without being disagreeable.

4                   In at least one of the pleadings in the --  
09:59:47 5 that have been filed in this case by one of the parties, it  
6 was suggested that, you know, by participating in this  
7 case, that either the lawyers or the parties might be  
8 subject to, let's just say, bad behavior. And let me --  
9 let me stress this. As a Judge, I know in the last case,  
10:00:12 10 after I ruled, the last similar case to this, I mean I got  
11 nasty letters. I got hate mail. I got phone calls. I got  
12 death threats from both sides, actually, and with being a  
13 judge that kind of goes with the territory. But it's not  
14 the territory for the lawyers, or the court staff, or the  
10:00:35 15 parties, and particularly I am talking about the  
16 intervenors. And if I hear of -- and I am telling the  
17 lawyers right now, if I hear of any conduct that is of an  
18 intimidating fashion or in any way obstructs their rights,  
19 I'll take appropriate action.

10:00:57 20                   And Ms. Perales is here representing them  
21 today, and I am telling her in front of everybody out loud,  
22 if there is -- if you hear of any conduct that is  
23 detrimental to your clients, I want to know about it.  
24 Okay?

10:01:10 25                   All right. Let's talk law.

1 First of all, let me maybe make things  
2 easier for the attorneys in this case. What I plan to do,  
3 the format I plan to follow, is this: First of all, I am  
4 not considering a summary judgment today. So to the effect  
10:01:35 5 that anybody -- I know there is a pleading by the states  
6 that said, why don't you just go ahead and grant a summary  
7 judgment? I am not doing that. And I won't do that  
8 without giving everybody a lot of notice that I am going to  
9 consider that.

10:01:48 10 So what we're here today on is the  
11 injunction motion. What I'd like to do is I'd like to have  
12 each party, all four of you, make a short introductory  
13 statement of your positions, and then I want to talk  
14 about -- start with jurisdiction and standing, and I am  
10:02:14 15 going to ask Ms. Perales and her group to lead off with  
16 that because they basically have a motion to dismiss based  
17 on that. And then I am going to move to the merits, and  
18 then the merits of the request for an injunction, and when  
19 I get to that stage, I am going to ask Mr. Disher and the  
10:02:39 20 State of Texas to take the lead on that because that is  
21 their motion.

22 But let me start, if I will, and let me  
23 ask the State of Texas to lead off in just a short opening  
24 statement, if you will.

10:02:51 25 MR. DISHER: Thank you, Your Honor.

1 Your Honor, Todd Disher for the State of  
2 Texas, and may it please the Court.

3 I would like to start by just giving a  
4 brief overview of where things stand after two months of  
10:03:07 5 discovery and two rounds of post-discovery briefing. Your  
6 Honor, the president does not have the sweeping power to  
7 grant lawful presence and work authorization in violation  
8 of Congress's duly enacted laws. That is a dangerous  
9 conception of Executive power that the Fifth Circuit has  
10:03:23 10 struck down.

11 In other words, the legal issues in this  
12 case have already been decided by binding precedent; and  
13 after 29 depositions, 12,000 pages of document production,  
14 300 pages of briefing, and 7,000 pages of exhibits, the  
10:03:37 15 facts really are not in dispute either.

16 In response, the DACA intervenors do  
17 little more than retry arguments that have already been  
18 rejected by this Court and the Fifth Circuit, and they have  
19 never once acknowledged that the Fifth Circuit affirmed the  
10:03:53 20 injunction of not only DAPA but the expansion of DACA as  
21 well.

22 For example, they have filed over 100  
23 pages of briefing, and yet they spent just three paragraphs  
24 discussing the Fifth Circuit's prior ruling that DAPA was a  
10:04:06 25 substantive violation of the APA. And in those three

1 paragraphs they do not offer any meaningful legal  
2 difference between DAPA and DACA. And on the procedural  
3 APA claim, they continue to insist that DACA was a, quote,  
4 general statement of policy, not subject to  
5 notice-and-comment rulemaking. But that ignores that the  
6 implementation of DACA was the very basis for the Fifth  
7 Circuit's rejection of that argument as it applied to DAPA  
8 and expanded DACA.

9 In the intervening three years since the  
10 Fifth Circuit's rulings, the states claims have only become  
11 stronger. On the substantive APA claim it has come to  
12 light that DACA does, indeed, allow some recipients a  
13 pathway to citizenship that would not be available to them  
14 but for DACA. And on the procedural APA claim, intervenors  
15 themselves admit that DACA granted, quote, authorized  
16 presence and the authorization of work. Those are  
17 substantive benefits that require notice-and-comment  
18 rulemaking, regardless of whether any individual agents  
19 exercise discretion in approving DACA applications, and  
20 that alone is enough to grant -- to grant relief for the  
21 Plaintiff States.

22 Additionally, as for discretion, USCIS has  
23 confirmed that it cannot identify a single application that  
24 met DACA's stated criteria and was then denied. And as  
25 Plaintiff States Exhibit 46 shows, the senior staff at the



1 USCIS Texas Service Center confirmed that such  
2 discretionary denials simply did not happen.

3 "Good morning, Brendan, I have confirmed  
4 with TSC" -- that's the Texas Service Center -- "Docket  
10:05:51 5 Supervisor POC that to the best of our knowledge, TSC has  
6 not issued a DACA denial purely on discretion when all  
7 other DACA guidelines have been met." And this is from a  
8 service center that has processed over 76,000 DACA  
9 applications.

10:06:08 10 Your Honor, the Fifth Circuit correctly  
11 held that the INA flatly does not permit the  
12 reclassification of millions of illegal aliens as lawfully  
13 present and thereby make them newly eligible for a host of  
14 federal and state benefits, including work authorization.

10:06:32 15 The Executive's doing so was a violation  
16 of its duty to take care that the Congress's laws are  
17 faithfully executed. Likewise, the states' standing is  
18 even more certain now than it was in the predecessor case.  
19 Twenty states have sued over DACA's rescission, and every  
10:06:47 20 court has recognized those states' standing.

21 This Court allowed New Jersey to intervene  
22 in this case to protect its sovereign, quasi-sovereign, and  
23 proprietary interests; and the Plaintiff States have the  
24 same right to protect those same interests.

10:07:01 25 The facts supporting the states' standing

1 are not seriously in dispute. The intervenors' witnesses  
2 admit that the states spend money to provide education,  
3 healthcare and law enforcement services to DACA recipients.

4 In fact, one of their own witnesses  
10:07:17 5 estimated that Texas spends over \$250 million every year to  
6 provide those services to DACA recipients, and the DACA  
7 intervenors own witness confirms that the number of DACA  
8 recipients in the Plaintiff States will go down if DACA  
9 ends. Thus the states have a real tangible financial  
10:07:36 10 injury that is fairly traceable to the continuation of DACA  
11 and redressable by the termination of DACA.

12 In addition, the states have standing to  
13 protect the health and well-being of their citizens.  
14 Congress has passed laws that define who is eligible for  
10:07:50 15 work authorization. Those laws have serious policy  
16 consequences, and how to weigh those consequences is for  
17 Congress to decide.

18 But the Texas Association of Business,  
19 along with others, acknowledge that DACA recipients have  
10:08:04 20 been hired over citizens and other lawfully present  
21 workers, and those companies would hire citizens and other  
22 lawfully present workers to replace the DACA workers should  
23 DACA end. Those --

24 THE COURT: But where do I have that?

10:08:18 25 MR. DISHER: Yes, Your Honor. That is in the

1 brief of the -- the chambers of commerce filed by the Texas  
2 Association of Business as well as others, as well as in  
3 some of the exhibits filed by the intervenors, citing  
4 declarations filed in the California lawsuit related to  
10:08:35 5 the -- the Apple Director of Human Resources as well as  
6 Univision. They indeed, identify the specific number of  
7 DACA recipients employed by certain businesses, including  
8 businesses in Texas, and then acknowledge that if DACA  
9 ends, they will have to spend money to try to hire  
10:08:52 10 replacements for those workers.

11 Those business groups are free to lobby  
12 their legislators to change the law should they disagree  
13 with the policy, but economic concerns do not make lawful  
14 what is otherwise unlawful, and the states have standing to  
10:09:07 15 protect for their citizens the benefits of Congress's  
16 carefully crafted plan.

17 As for the institutional injury the states  
18 suffer from the Executive's abdication of Congress's law on  
19 a massive scale, the use of advance parole only magnifies  
10:09:24 20 the harm previously found by this Court. And the Fifth  
21 Circuit has already confirmed that the causal link between  
22 DACA and the state's harm is even more clear than the  
23 nonregulation of emissions from new cars on rising sea  
24 levels and shrinking coast lines in *Massachusetts vs. EPA*,  
10:09:41 25 thus the states are due special solicitude in the standing

1 analysis.

2                   Your Honor, this is not a close case. The  
3 issues in front of the Court are legal questions that have  
4 already been decided, and there are no serious issues of  
10:09:53 5 material fact. In terms of balancing the equities in the  
6 public interest, the intervenors allege reliance interests  
7 should not be afforded anyway because of their own claim  
8 that DACA's status is revokable at any time.

9                   No amount of economic activity or  
10:10:08 10 hypothetical public safety benefit justifies such an  
11 unlawful and arbitrary erosion of the law, and courts act  
12 within the broad public interest when they maintain the  
13 balance of the separation of powers. The laws passed by  
14 Congress themselves are a declaration of the public  
10:10:24 15 interest.

16                   And the 2012 executive memo that created  
17 DACA, unilaterally granted lawful presence, work  
18 authorization, a new pathway to citizenship, and a host of  
19 other benefits in direct defiance of those laws. In 15  
10:10:41 20 days that program will come back in full force and effect  
21 without an injunction from this Court. That means in 15  
22 days, DHS will begin accepting new DACA applications, and  
23 in 15 days DHS will begin accepting new applications for  
24 advance parole.

10:10:56 25                   Thank you, Your Honor.

1 THE COURT: Ms. Perales. Or the government.

2 MR. SHUMATE: Good morning, Your Honor. May it  
3 please the Court, Brett Shumate for the United States.

4 The Departments of Justice and Homeland  
10:11:18 5 Security have concluded that the prior administration's  
6 DACA policy is unlawful. DACA is unlawful because it is an  
7 open ended circumvention of the immigration laws. It  
8 suffers from the same legal defects as the DAPA and  
9 expanded DACA policies which this Court enjoined in an  
10:11:35 10 opinion affirmed by the Fifth Circuit and the Supreme  
11 Court.

12 After reviewing the Attorney General's  
13 opinion on this matter, DHS rescinded the prior  
14 administration's DACA policy and began an orderly wind down  
10:11:47 15 of DACA in September of 2017. But the current  
16 administration has been unable to fully end the DACA  
17 policy.

18 Court's in New York and San Francisco have  
19 issued overly broad injunctions that require the government  
10:11:59 20 to continue most of the DACA policy on a nationwide basis.  
21 Another court in DC vacated the government's rescission of  
22 DACA altogether. Absent a stay of that order, DACA will go  
23 back into full effect.

24 The government is appealing all of those  
10:12:14 25 decisions on an expedited basis, and vigorously defending

1 the government's decision to rescind DACA as an unlawful  
2 action of the Executive Branch.

3                   The plaintiffs in this case bring a direct  
4 challenge to the lawfulness of the 2012 DACA policy. We  
10:12:29 5 have consistently acknowledged in this case, and in all the  
6 others, that DACA is unlawful and it should be rescinded.  
7 We have also consistently maintained our vigorous  
8 opposition to nationwide injunctions, especially the overly  
9 broad injunctions from the New York and San Francisco  
10:12:43 10 courts which require the government to continue DACA  
11 throughout the country, including in Texas and all the  
12 Plaintiff States.

13                   Nevertheless, if the Court is inclined to  
14 grant an injunction that would conflict with the  
10:12:53 15 injunctions issued by those courts, we would ask the Court  
16 to stay any such injunction for 14 days so the government  
17 can seek emergency relief in all of the courts that have  
18 issued injunctions that might conflict with an injunction  
19 issued by this Court. Thank you, Your Honor.

10:13:06 20                   THE COURT: Thank you, Mr. Shumate.

21                   MS. PERALES: Good morning, Your Honor. We are  
22 going to follow the Court's format that has been  
23 established for this morning, and so I will speak for  
24 perhaps only a minute to introduce some of the arguments  
10:13:31 25 that we are going to make, so that my colleague,

1 Mr. Hallward-Driemeier, may take up some of the  
2 jurisdictional arguments that the Court said it wanted to  
3 hear first.

10:13:46 4 I have a longer response to some of the  
5 merits issues that were raised by my friend Mr. Disher, and  
6 will prepare to deliver that after we tackle jurisdiction.

7 THE COURT: Okay. That is fine.

10:14:03 8 MS. PERALES: So just on a quick overview, Your  
9 Honor, we do contend that the plaintiffs in this case lack  
10 standing, and similarly that they cannot establish  
11 irreparable injury, which is a necessary component of  
12 obtaining a preliminary injunction. So that both,  
13 plaintiffs are not entitled to a preliminary injunction but  
14 also that their lack of standing means that the Court does  
10:14:20 15 not have jurisdiction here.

16 We will focus our argument on distinctions  
17 between DACA and DAPA, and why we contend that the Fifth  
18 Circuit decision in the DAPA case is not a magic wand here  
19 that dictates the outcome.

10:14:37 20 We also will highlight for the Court the  
21 recent Supreme Court decision in *Trump vs. Hawaii*, which we  
22 contend perhaps provides additional guidance to the Court  
23 in terms of deference that is due to the Executive when it  
24 is making discretionary decisions in the area of  
10:14:57 25 immigration. And then, finally, we will highlight that as

1 a result of the limited and expedited discovery that we  
2 have had to date, that the evidence here shows that there  
3 is true discretion being exercised with respect to  
4 adjudication of DACA applications, and there is no rubber  
5 stamping.

10:15:16

6 Thank you, Your Honor.

7 THE COURT: Thank you.

8 MS. WAINER APTER: Thank you, Your Honor.

9 Rachel Wainer Apter on behalf of the state of New Jersey.

10:15:34

10 I will also only speak for a minute, and then reserve our  
11 substantive responses to the PI portion of the argument.

12 The purpose of a preliminary injunction is  
13 to preserve the status quo until a trial can be held on the  
14 merits so that the Court's jurisdiction is not rendered  
15 futile. Here, plaintiffs attempt to turn this equitable  
16 remedy on its head. DACA has been the status quo since  
17 June 15, 2012, more than six years ago, and plaintiffs  
18 request preliminary injunctive relief not to preserve the  
19 status quo but, instead, to impact the lives of the 689,800  
20 current DACA grantees and the millions of Americans that  
21 they impact every day.

10:15:49

10:16:11

22 DACA grantees are full members of the New  
23 Jersey community and of the United States. They're causing  
24 no harm to Texas or to any of the Plaintiff States, and yet  
25 plaintiffs request an order from this Court upending their

10:16:25



1 lives six years in.

2                   Plaintiffs' main theory of the case is  
3 that this case has already been decided by the Fifth  
4 Circuit in the DAPA decision. But that is simply not true  
10:16:41 5 as to the likelihood of success on the merits, irreparable  
6 harm, balance of the equities or the public interest  
7 factors.

8                   On the likelihood of success on the  
9 merits, the Fifth Circuit's decision specifically on the  
10:16:54 10 substantive APA claim related to portions of the INA that  
11 provided a pathway to legal status on -- that someone could  
12 get once he or she had a citizen child, and that is not  
13 relevant here. As to whether the Napolitano memo required  
14 notice and comment, both the Fifth Circuit and this Court  
10:17:19 15 relied on extrinsic evidence; namely, the declaration of  
16 Mr. Palinkas, DACA's standard operating procedures, and the  
17 denial rate of accepted applications, all of which  
18 discovery in this case has shown to be vastly different  
19 here.

10:17:33 20                   When it comes to irreparable harm, the  
21 Plaintiff States in the DAPA litigation were able to show  
22 irreparable harm because of driver's license costs, costs  
23 that they would incur in providing driver's licenses to  
24 DAPA grantees. Here they have made no claim as to any harm  
10:17:51 25 related to driver's licenses, and have not shown any harm

1 from DACA or DACA grantees.

2 And as to the balance of the equities and  
3 the public interest factor, this Court concluded that DAPA  
4 should be preliminarily enjoined before it was implemented  
10:18:06 5 because if DAPA were permitted to take effect, it would be  
6 difficult or even impossible for anyone to unscramble the  
7 egg. Whereas, on the other hand, preliminarily enjoining  
8 DAPA's implementation would merely preserve the status quo  
9 that had already -- that had always existed. Here, as I  
10:18:23 10 mentioned, it is the complete opposite.

11 THE COURT: Thank you. All right. Let me  
12 start with the intervenors and let's talk about the claim  
13 of lack of jurisdiction and standing.

14 Mr. Hallward-Driemeier.

10:18:52 15 MR. HALLWARD-DRIEMEIER: May it please the  
16 Court, Doug Hallward-Driemeier on behalf of the individual  
17 defendant intervenors.

18 Just to clarify, there are several  
19 jurisdictional arguments as Your Honor's opening indicated.  
10:19:09 20 I would like to address what we consider the real threshold  
21 questions that are addressed in the motion to dismiss,  
22 which are the lack of genuine adversity or redressability  
23 on the broader question of standing, which really requires  
24 consideration of that factual record that has been  
10:19:30 25 developed in discovery.

1 My colleague Ms. Perales will be prepared  
2 to address that, and I believe that New Jersey has  
3 similarly allocated those issues on its side.

10:19:48

4 So to start with, the -- the issues in the  
5 motion to dismiss, there is a fundamental problem that goes  
6 to the heart of Article III when the plaintiff and  
7 defendant are in agreement about the relief that the Court  
8 should provide, because that deprives the Court of the  
9 benefit of the adversarial process. But it is even more  
10 dire when the relief that they agree the Court should grant  
11 is to contradict an injunction that's been issued by a  
12 sister court.

10:20:12

13 The most analogous case of all that have  
14 been described in the briefing on this issue is the  
15 decision of the Southern District of Alabama in another  
16 case that was also very high profile, and engendered strong  
17 opinions on both sides, and that was litigation involving  
18 Chief Judge Moore's Ten Commandments monument at the  
19 Supreme Court of Alabama.

10:20:32

10:20:53

20 And in the *McGinley v. Houston* case that  
21 is cited in the briefs, Judge William Steele wrote  
22 something that I think really encapsulates the problem and  
23 how fundamental it is. He said that, Law does not allow a  
24 party to file a horizontal appeal from one district judge  
25 to another. The other Court's order will remain in place

10:21:14

1 no matter what this Court does. If the Court were to grant  
2 plaintiffs the relief they seek and order the defendants  
3 not to remove the monument, chaos would ensue. The  
4 defendants would be forced to choose which of two binding  
10:21:31 5 conflicting court orders to follow. They would be in  
6 violation of one of those orders no matter what they did.  
7 Under these circumstances, the order of the administration  
8 of justice and respect for the rule of law demand that this  
9 Court not exercise jurisdiction over the plaintiffs'  
10:21:49 10 claims.

11 THE COURT: Let me ask you, you know,  
12 theoretically, of course, no court would disagree with that  
13 statement, but, I mean, for instance, let's take The New  
14 York District Court case, didn't they enter an order  
10:22:06 15 contrary to my injunction?

16 MR. HALLWARD-DRIEMEIER: Well, Your Honor, the  
17 parallel with respect to the earlier litigation involving  
18 DAPA would be if a court had gone -- if a Plaintiff State  
19 had gone in and asked another court, perhaps while the  
10:22:23 20 Obama Administration was still in place, to enter an order  
21 requiring the Obama Administration to implement DAPA, which  
22 was the program that this Court's order had addressed, and  
23 that indeed would have presented precisely the same  
24 problem. It would have been, in Judge Steele's words,  
10:22:41 25 chaos contrary to the orderly administration of justice.

1                   The remedy for the Obama Administration in  
2 that instance of Your Honor's order, was to take an appeal,  
3 which they did, and it was unsuccessful. Here, the  
4 government's remedy from the orders of New York,  
10:23:01 5 California, the District of Columbia, is to take an appeal  
6 from those orders, and they have. But what they're trying  
7 to do is to sidestep, if you will, that normal orderly  
8 administration of justice.

9                   Now, they went to the Supreme Court after  
10:23:18 10 the California district judge entered his preliminary  
11 injunction, and they said to the Supreme Court, this is so  
12 important that we ought to expedite things. We ought to go  
13 around the normal process, and go straight from the  
14 district court to the Supreme Court. And the Supreme Court  
10:23:36 15 said, no, that this case is not one that would warrant  
16 evading in any way the normal process. The normal process  
17 is to first go to the Court of Appeals at the Ninth Circuit  
18 and then to the Supreme Court.

19                   When the plaintiffs in this case  
10:23:56 20 explain -- this was in connection with the irreparable harm  
21 argument in the PI briefing in their last brief -- why it  
22 was they waited, they said there was -- and this is, if you  
23 will, at page 15 of ECF 188, I believe. Oh, I'm sorry, I  
24 misspeak. It was -- in their latest brief they say that  
10:24:25 25 there was no basis on which to bring an action until April

1 24, 2018, when the district court for District of Columbia  
2 issued its order enjoining DACA's rescission. That's ECF  
3 282 at 52.

10:24:45 4 So they're acknowledging that there was no  
5 dispute, and indeed there is still no dispute between the  
6 Plaintiff States and the federal defendants. The thing  
7 that gave rise to their supposed injury is the issuance of  
8 an injunction of another court. And in that instance, Your  
9 Honor, the remedy for them is to participate as amicus, or  
10:25:07 10 intervene perhaps, in the appeal from the injunction from  
11 which they disagree.

12 Now, they maintain that that injunction is  
13 overly broad, and we don't take a position on that. What  
14 we do take a position on is that it's not a question that  
10:25:26 15 the injunction they asked Your Honor to issue is directly  
16 to the contrary. The injunction --

17 THE COURT: Let me ask you this. If they -- if  
18 Texas, and these other states, hypothetically, if they're  
19 being harmed by DACA, and if the federal government, which  
10:25:42 20 they indicated they are, they are going to continue DACA at  
21 least as long as there is an injunction telling them they  
22 have to, isn't Texas continually harmed if the hypothetical  
23 damage is occurring?

24 MR. HALLWARD-DRIEMEIER: Well, Your Honor, that  
10:25:57 25 is certainly the argument they make and they say that that

1 is the circumstance -- the circumstance here is the same as  
2 in the Supreme Court's decision in *Windsor* and in *Chadha*.

3 THE COURT: No, let me shift gears on you.  
4 Well, let's talk about *Windsor* and *Chadha*. You brought up  
5 *Windsor* and *Chadha*.

10:26:12

6 *Windsor* involved the Defense of Marriage  
7 Act, and in that case the administration says we're not  
8 defending the Defense of Marriage. Even though it was a  
9 federal law, we're not defending it. So you had -- you  
10 have the plaintiff saying it's not a law. We have the  
11 defendant saying we're not defending it, and the Supreme  
12 Court said there was jurisdiction.

10:26:25

13 MR. HALLWARD-DRIEMEIER: Right. And that was  
14 because there was no question with respect to  
15 redressability in that case. The -- the Court had  
16 jurisdiction over the statute. It was the statute that was  
17 causing Edie Windsor's harm. She was -- the federal  
18 government was applying the statute to her. They were  
19 insisting on withholding several hundred thousand dollars  
20 in inheritance tax, and she was not going to get that money  
21 back unless the statute was declared unconstitutional by a  
22 court.

10:26:38

10:26:57

23 THE COURT: Well, isn't that what Texas is  
24 asking me to do is to hold DACA to be unconstitutional?

10:27:11

25 MR. HALLWARD-DRIEMEIER: Well, but at this

1 point DACA, in terms of the Executive act, is not what  
2 they're complaining about because but for -- and this is  
3 what the federal government acknowledges in their brief.  
4 They say that -- this is ECF 194 at 2, that they continue  
5 to maintain DACA policy only because of the preliminary  
6 injunctions issued by order -- other courts.

7                   So this isn't an instance as in *Windsor* or  
8 as in *Chadha* where the Court can order that the statute is  
9 unconstitutional. Courts do that all the time, that the  
10 statute is unconstitutional and they provide the relief.  
11 The relief is don't enforce that statute against the party.  
12 There is immediate enforcement of that law against the  
13 individual who is the party.

14                   THE COURT: So -- so --

15                   MR. HALLWARD-DRIEMEIER: That is not true here.

16                   THE COURT: Help me here then. What is your --  
17 if I follow your argument, you're saying that the New York  
18 court that entered an injunction and the DC court that says  
19 it is going to enter an injunction, don't have jurisdiction  
20 either.

21                   MR. HALLWARD-DRIEMEIER: No. My point is, Your  
22 Honor, that they have injunction -- they have jurisdiction.  
23 There are -- in each of those cases in addition to State  
24 Plaintiffs, because -- and, again, the state-standing issue  
25 is something Ms. Perales will address -- but in addition to



1 State Plaintiffs they have individual plaintiffs in those  
2 cases. So we believe they do have jurisdiction. Whether  
3 they --

10:28:34

4 THE COURT: So it is all right for them to have  
5 a subsequent decision but not all right for the Fifth  
6 Circuit to have one?

10:28:48

7 MR. HALLWARD-DRIEMEIER: Well, Your Honor, in  
8 terms of -- the -- again, the -- the chaos that Judge  
9 Steele describes, and which I think Your Honor would agree  
10 cannot abide, is the equivalent would be in the DAPA  
11 litigation if the New York court had ordered the Obama  
12 Administration to continue to apply DAPA. That would be  
13 chaos. That is not the orderly administration of law. And  
14 the Obama Administration did not seek that, and New York  
15 did not seek that, and they couldn't have, in our view.  
16 There would not -- that would have been the horizontal  
17 appeal to the --

10:29:09

18 THE COURT: To the extent that the Courts are  
19 creating chaos, I mean, don't we already have that?

10:29:21

20 MR. HALLWARD-DRIEMEIER: No, Your Honor.

21 THE COURT: Don't we have a Maryland case that  
22 said they could dissolve DACA? So Maryland has already  
23 decided -- Maryland District Court has decided just the  
24 opposite of the California and New York and the Washington  
25 case.

10:29:35

1 MR. HALLWARD-DRIEMEIER: Well, and what has  
2 happened, Your Honor, is that those orders are being  
3 appealed to the courts of appeals. That's the appropriate  
4 process of the administration of justice.

10:29:46

5 This Court in --

6 THE COURT: So wouldn't the loser in this case  
7 have that same right, to appeal to the Fifth Circuit?

10:29:59

8 MR. HALLWARD-DRIEMEIER: Well, but, Your Honor,  
9 there is no -- there is no other court in which a party is  
10 asking the judge to issue an order to order the defendant  
11 to do precisely what another judge -- the opposite -- do  
12 precisely what another judge has ordered that party not to  
13 do.

10:30:18

14 What the -- what the plaintiffs here ask  
15 is that the Court enter an order enjoining the defendants  
16 from enforcing DACA. That's how they have characterized  
17 the relief that they are seeking. Whereas, the other  
18 courts have issued injunctions enjoining the federal  
19 defendants to continue DACA.

10:30:37

20 THE COURT: Don't we have exactly the opposite  
21 orders, though? We have -- we have Maryland saying it's  
22 okay, and we have California saying it is not okay.

10:30:51

23 MR. HALLWARD-DRIEMEIER: But the Maryland court  
24 did not issue an injunction compelling the defendants to do  
25 anything. There are no other conflicting injunctions.

1 And, again, the other part --

2 THE COURT: So why does that impact  
3 my jurisdiction?

4 MR. HALLWARD-DRIEMEIER: Well, in Texas --

10:30:59

5 THE COURT: It sounds to me like what you're  
6 complaining about is what relief I might grant if I think  
7 Texas is right.

8 MR. HALLWARD-DRIEMEIER: Well, redressability  
9 is, in fact, a critical element of Article III

10:31:12

10 jurisdiction. And the Court can't redress the injury  
11 because the federal defendants have already purported to  
12 rescind DACA. If those other orders of those other courts  
13 go away, then there is no DACA. There is nothing for Your  
14 Honor to decide. If those other orders are reversed on  
15 appeal, then, DACA has been rescinded. The plaintiffs have  
16 nothing to complain about.

10:31:31

17 THE COURT: What about --

18 MR. HALLWARD-DRIEMEIER: So it is not the  
19 defendants' actions that they are complaining about. It's  
20 the defendants' actions that they are taking subject to  
21 another court's order. So that's why we say this is  
22 different, that they're asking you to review another  
23 court's order.

10:31:41

24 THE COURT: The defendants are still the ones  
25 who are operating DACA, though. They are still maintaining

10:31:52

1 DACA.

2 MR. HALLWARD-DRIEMEIER: But not --

3 THE COURT: Doing it reluctantly. I mean, I  
4 think we can all concede --

10:31:59 5 MR. HALLWARD-DRIEMEIER: Right.

6 THE COURT: -- if they had won those cases,  
7 they wouldn't be doing it.

8 MR. HALLWARD-DRIEMEIER: And if they were doing  
9 it by -- by force of their own Executive action, you would  
10:32:09 10 have jurisdiction over that. If they were doing it by  
11 force of a statute that Your Honor could declare  
12 unconstitutional, there would be jurisdiction. But here,  
13 the -- the fact is that the thing that is compelling the  
14 federal defendants to take the act that the plaintiff  
10:32:27 15 complains about is another court's order, not the federal  
16 defendants themselves.

17 THE COURT: So explain to me how the court in  
18 Washington had jurisdiction, if you're saying  
19 redressability is the key.

10:32:39 20 MR. HALLWARD-DRIEMEIER: Well, because the  
21 plaintiffs came to the court in Washington saying that  
22 the -- there is a policy that we have applied for and  
23 received deferred action, and they are rescinding that  
24 policy. They are not going to accept my renewal  
10:32:55 25 application, give me relief, and that is relief that they

1 could give at this point.

2 THE COURT: Well, no, the California court had  
3 already given them. What DC did was they went further,  
4 didn't they? Didn't they further enjoin them or say at  
10:33:08 5 least because they hadn't entered the order, as I  
6 understand it, but he has already announced he is going to  
7 enjoin in the future?

8 MR. HALLWARD-DRIEMEIER: Right.

9 THE COURT: Which -- wait a minute, let me  
10:33:18 10 finish. Which California already said they could collapse  
11 it in the future, didn't they? So, he's redressing  
12 something the opposite way than California did and you're  
13 okay with that.

14 MR. HALLWARD-DRIEMEIER: Well, there is not --  
10:33:32 15 there is not an inconsistent -- there is not -- there is  
16 not an order: Do X; don't do X. That's the situation we  
17 have here: Do X; don't do X.

18 THE COURT: What we do have is we have an order  
19 saying, don't do X; and an opinion saying they can do X.  
10:33:47 20 Don't you see those in conflict?

21 MR. HALLWARD-DRIEMEIER: Well, they are not  
22 in -- they are not in direct conflict.

23 THE COURT: If I was the government, I would be  
24 saying, help me out here. What am I going to do?

10:33:56 25 MR. HALLWARD-DRIEMEIER: They are not in direct

1 conflict. And to the extent -- Your Honor, it's really not  
2 my brief in the sense to defend the extent of any other  
3 court's injunction, because if there is any overbreadth to  
4 those courts' orders, there is a process to test that.

10:34:16 5 That is take an appeal.

6 THE COURT: Well, we are going to do that same  
7 process here.

8 MR. HALLWARD-DRIEMEIER: Well --

9 THE COURT: I mean, it is okay if you get a  
10:34:23 10 different decision in the Second Circuit, and a different  
11 decision in the Third Circuit, and a different decision in  
12 the Ninth Circuit, but not a different decision in the  
13 Fifth Circuit?

14 MR. HALLWARD-DRIEMEIER: Well, Your Honor,  
10:34:34 15 again, this would be the first instance -- and the  
16 government's presentation here is telling. I think it is  
17 telling in a number of ways. First of all, it should, in  
18 my view, having been a government lawyer for over a decade,  
19 I think it sets off alarm bells in my head, I would think  
10:34:52 20 for the Court as well, that the -- it's me representing a  
21 private party that's here moving to dismiss the plaintiffs'  
22 suit as opposed to the United States, who would in any  
23 other case be moving to dismiss and arguing no standing,  
24 arguing no reviewability, all of the arguments that we're  
10:35:10 25 making. The United States is not making those arguments

1 because they want the Court to enter this order.

2 THE COURT: Well, that was the same -- wasn't  
3 that the same fact pattern in the *Windsor* case?

4 MR. HALLWARD-DRIEMEIER: No, Your Honor.

10:35:20 5 Because in *Windsor* -- this goes to not the redressability  
6 part of the argument, but the adversary process part. In  
7 both *Windsor* and in *Chadha*, there were intervenor  
8 defendants who were the parties who had authority over the  
9 law that was at stake. If Congress had passed the law in  
10:35:42 10 *Windsor*, Congress had exercised, or one house of Congress  
11 has exercised the veto in *Chadha*, they were defending their  
12 own constitutional prerogatives in those cases. They  
13 intervened to do that.

14 We don't have any authority over DACA at  
10:35:58 15 all, and so we don't cure the lack of adversity. It has to  
16 be --

17 THE COURT: Aren't you in here arguing that I  
18 should not enjoin them?

19 MR. HALLWARD-DRIEMEIER: Well, Your Honor --

10:36:11 20 THE COURT: So I do have controversy, don't I?

21 MR. HALLWARD-DRIEMEIER: No, Your Honor. The  
22 cases are clear.

23 THE COURT: You are not arguing that DACA  
24 should be continued?

10:36:18 25 MR. HALLWARD-DRIEMEIER: We are arguing that.

1 THE COURT: Okay. Then they're arguing it  
2 shouldn't be. Don't I have two people on the opposite side  
3 of the fence arguing against each other?

4 MR. HALLWARD-DRIEMEIER: Well, let's -- so,  
10:36:27 5 first of all, the cases are clear that an intervenor that  
6 comes in to urge dismissal for lack of jurisdiction cannot,  
7 by definition, cure the lack of jurisdiction.

8 And, secondly, with respect to the lack of  
9 an adversary process, the adversarial process is designed  
10:36:47 10 to ensure that the Court has the benefit of the fullest  
11 presentation; and that, Your Honor doesn't have here. And  
12 one of the reasons Your Honor doesn't have that here is  
13 because if the government was a true adversary of the  
14 plaintiffs, trying to defend DACA, the government would be  
10:37:06 15 marshalling the evidence to show that DACA is, in fact,  
16 applied in a discretionary case-by-case basis.

17 But they're not marshalling that evidence  
18 because they don't want the Court to have the benefit of  
19 that. So we're trying to, like pulling teeth, get that  
10:37:23 20 evidence from the defendants. We issued interrogatories --  
21 interrogatories and the government begrudgingly conceded  
22 that based on an informal survey, they're aware of some  
23 instances in which applications that would otherwise meet  
24 all their criteria have been denied. But it's too  
10:37:44 25 burdensome for them to give us any of the details about



1 that. And then when we seek further discovery of those  
2 federal employees, they said, well, we are going to move to  
3 quash. You don't need that.

4 That's depriving the Court of the benefit  
10:37:59 5 of the adversarial process that is critical under our  
6 system of justice, ensuring that decisions are made on the  
7 merits, and not because the plaintiff and the defendant  
8 agree on the relief they want the Court to bring.

9 THE COURT: Didn't y'all take depositions on  
10:38:14 10 that very point?

11 MR. HALLWARD-DRIEMEIER: Your Honor, we have  
12 absolutely tried. But, no, it is not a substitute. And  
13 Ms. Perales can provide you, I am sure, much greater detail  
14 than I can about the ways in which we attempted to obtain  
10:38:27 15 information. We were told we could not take depositions of  
16 the federal employees. We were again -- we sought  
17 interrogatory responses. We were given only the most  
18 general information.

19 So if the Plaintiff States say here, as my  
10:38:41 20 friend from Texas did just recently, that we are not able  
21 to identify an individual instance in which an application  
22 that otherwise met all of the criteria was denied on a  
23 discretionary basis, that is because the federal defendants  
24 have that information and won't give it to us. You have  
10:38:59 25 been deprived of the benefit of that most critical element

1 of Article III, the adversary process.

2                   So for all of those reasons, Your Honor,  
3 that this is really a horizontal appeal, I realize that  
4 there are overlapping issues between the DAPA litigation  
10:39:17 5 and this litigation, but they are not the same. The  
6 federal circuit made clear in its opinion that DACA and  
7 DAPA are different; that DACA, a much smaller number of  
8 potential beneficiaries -- they were people who were very  
9 young when they came here. They have a different history.

10:39:35 10 They are ones who would be most likely to benefit from the  
11 favorable exercise of discretion, least likely to have  
12 negative exercise of discretion.

13                   These are very -- and we don't have the  
14 situation that we had in DAPA where there was a specific  
10:39:50 15 INA provision that addressed the exact classes of  
16 individuals, parents of U.S. citizens. We don't have that  
17 here. This case is different.

18                   And when the Courts -- and I -- I am sure  
19 Your Honor has read the *Regents* decision in California, and  
10:40:10 20 I think that the judge's opinion there very respectfully  
21 considers the Fifth Circuit's decision, and acknowledges  
22 the ways in which DAPA and DACA are different, and comes to  
23 a conclusion that the result for DACA has to be different.

24                   He couldn't simply have applied the DAPA  
10:40:29 25 decision, because they are two different -- they're two

1 different memoranda, two different beneficiary sets of  
2 individuals, with different characteristics.

3 THE COURT: So I should ignore the fact that  
4 the Fifth Circuit enjoined DAPA, the expansion of DAPA?

10:40:48

5 MR. HALLWARD-DRIEMEIER: Well, the expansion of  
6 DAPA, likewise, is different from the characteristics of  
7 the beneficiaries of the original memorandum because, for  
8 example, a significant number of the beneficiaries were the  
9 individuals who were over 31. Those, again, are going to  
10 be the older population. They are not the group of people  
11 who have been brought here as children, are still in  
12 school, are completing their education, who really have  
13 only one country to call home, and that is the United  
14 States.

10:41:05

15 If Your Honor does not have any further  
16 questions...

17 THE COURT: I am fine.

18 MR. HALLWARD-DRIEMEIER: Thank you.

19 THE COURT: Ms. Perales, you want to weigh in  
20 on standing?

10:41:23

21 MS. PERALES: Thank you, Your Honor.

22 With respect to standing, the plaintiffs  
23 have not provided evidence that DACA recipients cause costs  
24 in the three areas that Texas has identified. So just to  
25 set the table here, Your Honor, the only plaintiff that

10:42:01

1 came forward with a claim of injury due to costs was Texas,  
2 and it named the three areas: Health, education, and law  
3 enforcement. Following discovery, Texas added an  
4 additional point, which I'll address separately.

10:42:22

5 So, another important starting point for  
6 us is that Texas does not rely, for the purposes of the  
7 preliminary injunction, on costs associated with driver's  
8 licenses, and Texas has specifically stated to the Court  
9 that it is not relying on costs related to the driver's

10:42:42

10 licenses for this part of the case. And that's Docket 105  
11 at pages 2 and 3.

12 And so Texas did not provide any discovery  
13 on that issue, did not disclose a witness, and further  
14 stated that if we sought to try to depose somebody, that  
15 Texas would move to quash the subpoena.

10:43:00

16 And so we are in some different territory  
17 than we were in the DAPA case because of the -- because of  
18 Texas's statement that it will not rely on driver's license  
19 costs. And so what we're looking at now are the remaining  
20 areas where the Court -- where Texas has said it is  
21 incurring costs.

10:43:24

22 So first, education. Texas only pointed  
23 to costs related to public education of children who are in  
24 a category mutually exclusive with DACA recipients, and  
25 those are, as Texas identified, unaccompanied minors who

10:43:46

1 came across the border after 2014. So the set of children  
2 that -- that Texas identified and looked at costs related  
3 to are exactly a group that cannot be DACA recipients  
4 because, as the Court knows, DACA recipients have been here  
5 since 2007, have come in a much earlier period. And so  
6 there is just no evidence at all of any education costs  
7 associated with DACA because the study that Texas did and  
8 the amounts of money --

10:44:06

9 THE COURT: Let me interrupt you for a minute.

10:44:25

10 What's my standard that I judge this on?

11 MS. PERALES: Well, it has to be something,  
12 Your Honor.

13 (Laughter.)

14 MS. PERALES: It has to be something different

10:44:37

15 than zero. I am not -- I'm not sure. I mean, I am  
16 standing here. I would say it has to be a substantial  
17 number. But I don't have to defend that position because  
18 here with respect to education costs, there is simply no  
19 overlap between the categories of individuals. And thus

10:44:55

20 moving onto healthcare costs --

21 THE COURT: Wait a minute.

22 MS. PERALES: Yes.

23 THE COURT: What I was really asking you was a  
24 different question. At some point, if I am looking at

10:45:06

25 evidence to create standing, or the evidence that does

1 create the standing, I have to judge that evidence by some  
2 evidentiary standard. Now, clearly, if it is zero, you're  
3 right. But, what is -- what is my beyond a reasonable  
4 doubt, preponderance of the evidence? What is my standard?

10:45:28

5 MS. PERALES: Well, these are -- these are  
6 factual inquiries that Your Honor would have to find the  
7 fact to be true, and so I would -- I mean, I would think it  
8 would have to be at least by a preponderance of evidence  
9 that it is true. And not just that it's true in some

10:45:49

10 hypothetical sense or some categorical sense, but that it's  
11 actually true that there are identified people.

12 And I would like to remind the Court that  
13 we are at the preliminary injunction stage. We are not  
14 saying that, you know, there is no set of circumstances  
15 under which Texas could try to provide this evidence. We  
16 are only saying that at this point, Texas has not shown  
17 that it has standing with respect to these costs.

10:46:06

18 We can't predict what might happen in the  
19 future. But for now, for where we are today, we do not  
20 have the evidence that the Court would need to find  
21 standing.

10:46:24

22 Moving onto healthcare, Texas has  
23 identified a number of social welfare programs that -- for  
24 which undocumented immigrants may be eligible. But, again,  
25 Texas cannot identify any healthcare expenditures

10:46:44

1 specifically related to DACA recipients. What Texas does,  
2 and this is why we're seeing these huge numbers being  
3 predicted in the briefs, is that Texas estimates the cost  
4 of serving undocumented individuals statewide, and then  
10:47:01 5 attributes that entire cost to DACA recipients. That is  
6 sort of methodologically flawed, but also fails to identify  
7 any particular DACA recipient or any DACA recipients at  
8 all -- they don't have to be identified by name -- that are  
9 causing these costs.

10:47:20 10 There are further methodological problems  
11 with assuming that citizens and noncitizens use services at  
12 equal rates with respect to some of these programs where  
13 citizens and noncitizens are both eligible.

14 And so the bottom line here, Your Honor,  
10:47:33 15 is that undocumented immigrants are eligible for a few  
16 state funded healthcare services identified by Texas, but  
17 they are eligible for that whether or not they receive  
18 DACA. And there is no evidence suggesting that there are  
19 any DACA recipients who are in a slightly better position  
10:47:51 20 because they are work authorized and may be earning money  
21 that, in fact, makes them financially ineligible for these  
22 social welfare programs.

23 With respect to law enforcement, we have  
24 no evidence from Texas on any costs of providing law  
10:48:08 25 enforcement services to DACA recipients. And, in fact, we

1 have evidence weighing in the other direction, that DACA is  
2 actually quite helpful with respect to law enforcement  
3 because it does make people more comfortable to step  
4 forward and report crime.

10:48:23

5 THE COURT: What do I do with the evidence from  
6 Dr. Perryman?

7 MS. PERALES: Uh-huh. Yes.

8 THE COURT: Do you have a number for DACA? Did  
9 he say this is the cost attributable to DACA?

10:48:34

10 MS. PERALES: Well, thank you for the  
11 opportunity to talk about Dr. Perryman because he is our  
12 witness.

13 THE COURT: Dr. Perryman -- let me put it this  
14 way. He has got the longest CV of any person. He is the  
15 only person I have ever seen who has a table of contents to  
16 his CV.

10:48:44

17 (Laughter.)

18 MS. PERALES: I apologize for the length of his  
19 CV, Your Honor, and I promise to pass that along to him and  
20 suggest some edits.

10:48:54

21 Dr. Perryman was our witness. He does not  
22 provide the evidence that Texas lacks here. What  
23 Dr. Perryman did was he assumed for the purposes of his  
24 offset analysis that what Texas was seeing was true, that  
25 they had costs associated with DACA. But very importantly,

10:49:10



1 Dr. Perryman did not identify any specific cost  
2 attributable to DACA, and he says that over and over again  
3 in his deposition and in his report.

10:49:28

4                   What he does is what Texas did. He says,  
5 there is money being spent on undocumented individuals.  
6 DACA may be some portion of that, and I am going to assume  
7 for the purposes of comparison that that's right. Assuming  
8 -- for an expert to assume that something is correct  
9 because that's what the plaintiffs are asserting, and then  
10 go forward and say, but there is an offset, but the  
11 benefits outweigh the costs, is very different from  
12 providing the evidence that Texas needs in the first place  
13 to establish that it is being injured.

10:49:48

10:50:03

14                   And, finally, Dr. Perryman said,  
15 repeatedly, that whatever these costs are for serving  
16 undocumented individuals, they are going to be spent  
17 whether or not an undocumented person has DACA or doesn't  
18 have DACA. And so he was very clear on those points. You  
19 know, Texas has been unable to generate the evidence  
20 themselves, and pointing over to Dr. Perryman, who simply  
21 makes assumptions for the purposes of comparison, does not  
22 fill that evidentiary hole.

10:50:21

10:50:41

23                   These are the types of costs and the types  
24 of evidence that the Court did look at and comment on in  
25 the DAPA case when the Court noted that -- and this is

1 really with respect to redressability -- that granting an  
2 injunction would not change the presence of these  
3 individuals in this country, nor would it relieve the  
4 states of their obligations to pay for any associated  
10:51:02 5 costs. And so the Court has looked at this and found that  
6 it was really insufficient to establish standing both  
7 because it is not evidence of injury, and because of the  
8 issues around redressability.

9 I would like to take one moment, Your  
10:51:14 10 Honor, to move to the *parens patriae* argument, which is  
11 about labor market distortion; and this argument largely  
12 turns on arguments around the Affordable Care Act, the ACA.  
13 Texas has not provided any evidence that the employer  
14 mandate under the ACA has been enforced in Texas, and Texas  
10:51:39 15 hasn't identified any employers in Texas that would be  
16 subject to the mandate, meaning they have -- they are a  
17 large employer. They have over a certain threshold of  
18 employees, but at the same time that they don't provide  
19 health insurance to their employees. And that is a very  
10:51:57 20 basic requirement that Texas would have to come forward  
21 with some kind of information about who is subject to the  
22 mandate, if anybody, in terms of employers and whether the  
23 mandate is being enforced.

24 There is also no evidence that employers  
10:52:11 25 in this position would know that an individual was a DACA

1 recipient before hiring that person. Because, obviously,  
2 the employment authorization document would be presented in  
3 the process with HR after the person had already been  
4 hired. There is also no evidence that any DACA recipient  
5 has taken a job from a U.S. citizen either because of the  
6 ACA or otherwise, and there is no evidence related to the  
7 DACA intervenors that -- that provides that -- provides or  
8 satisfies that evidentiary showing.

9 Finally, whether or not employers are  
10 behaving a certain way with respect to the ACA is the kind  
11 of non-traceable to DACA injury that the Court has already  
12 recognized, the acts of third parties that tends not to  
13 give standing.

14 Texas does invoke other cases, other  
15 doctrines like *Massachusetts vs. EPA*, but those cases and  
16 those special concerns that are raised there do not  
17 dispense with the requirement to show injury, to show  
18 causation, and redressability. You still have to show  
19 that you're being injured before you move on to some of  
20 these other considerations.

21 And so, finally, Your Honor, the last  
22 comment that I have with respect to redressability and  
23 causation is that there is simply no evidence that DACA, as  
24 opposed to simply being undocumented, causes any of the  
25 costs that Texas is invoking here. DACA also does not

1 cause increased migration, and the Court noted that in its  
2 DAPA decision. Claims of influx based on decisions by  
3 other people who are outside the country does not provide  
4 the evidence that is required here. And the Court noted --

10:54:18

5 THE COURT: Let me --

6 MS. PERALES: Yes.

7 THE COURT: -- correct you there. I don't  
8 think I said it didn't cause people to want to come to the  
9 United States. I just said, you can't get relief based on  
10 that.

10:54:27

11 MS. PERALES: Yes, Your Honor. And I  
12 apologize. Let me correct it. That the Court was saying  
13 that these possible decisions by other individuals would  
14 not provide what Texas would need to be able to show its  
15 injury. And the Court said a myriad of reasons support a  
16 court's abstention from intervention when damages are  
17 premised upon the actions, third parties motivated by  
18 reports and misreports of governmental action.

10:54:43

19 And so, there is also, because we have  
20 generated a bit of a record here so far, there was  
21 testimony by the Texas's expert demographer that he  
22 definitely did not look into this. So, they don't have  
23 evidence on that side suggesting that there would be an  
24 influx; and then, of course, the evidence from defendant  
25 intervenors is that there is no connection between what

10:54:58

10:55:18

1 people hear about DACA and increased migration.

2 Finally, there is a contention by Texas  
3 that DACA recipients would leave, the self-deportation  
4 theory, if they lost DACA. The Court noted in its DAPA  
10:55:39 5 decision that those contentions are too speculative to be  
6 relied upon by this or any other court as a basis of  
7 redressability. That is at page 635 of the reported  
8 opinion. And Texas's expert demographer, again, was unable  
9 to provide any kind of estimate of how many people he  
10:55:57 10 thought would leave Texas or the United States if they  
11 lost --

12 THE COURT: Don't I have a study presented by  
13 y'all that says that, though?

14 MS. PERALES: No, Your Honor. If I could just  
10:56:04 15 finish --

16 THE COURT: I mean, as far as I can tell, your  
17 experts really helped out Texas; and Texas' experts really  
18 helped out you.

19 MS. PERALES: Well, Texas might say the first  
10:56:15 20 part of that, Your Honor, but we would contend that is  
21 simply not true.

22 Dr. Wong did not give estimates related to  
23 any Texan. He didn't identify any Texans. He didn't give  
24 any estimates of Texans who would leave. And, also, we do  
10:56:31 25 not rely on that survey. We did not put it forward as any

1 evidence in the case, and it simply doesn't provide the  
2 kind of information that the Court needs. You know,  
3 Dr. Wong identified 600 people nationwide who said they  
4 would go. And Texas also relies on the testimony of an  
10:56:49 5 individual from New Jersey saying --

6 THE COURT: Didn't his study say it was going  
7 to be like 22 percent?

8 MS. PERALES: He said that -- of the people who  
9 answered his survey and answered that question, that the  
10:57:02 10 actual "n" is 600 people, and from that he extrapolated to  
11 say that up to 20 percent of people nationwide. It is just  
12 not the kind of information that the Court can rely on to  
13 say that in Texas, there would be individuals who would  
14 choose to leave.

10:57:22 15 And, Dr. Potter, who is the Texas  
16 demographer, said that he could not estimate a number  
17 greater than one. He said probably more than one but less  
18 than all.

19 And so, Dr. Potter, who actually studies  
10:57:36 20 Texas demography, was very clear that he could not put a  
21 number on this idea of people who might decide to leave.  
22 And our -- the testimony of DACA recipients in this case is  
23 that they would not want to leave and they would try to do  
24 everything in their power to be able to stay, and they  
10:57:54 25 don't know anybody else who would leave either.

1 I would like to make one final point on  
2 redressability, Your Honor, which has to do with a comment  
3 in the final brief by Texas, that the Court could somehow  
4 enjoin or limit its injunction to enjoining future initial  
10:58:13 5 grants of DACA in order not to run afoul of other  
6 injunctions in the case. And it's our contention that if  
7 that's what Texas is asking for, then it has to make a  
8 connection between its claimed injuries and new DACA  
9 grants. And new DACA grants in Texas would be very young  
10:58:31 10 children who would be aging up -- you know, the defined  
11 class of DACA people, the very youngest, are 11. There are  
12 some number each year that ages up into 15, and --

13 THE COURT: Right.

14 MS. PERALES: -- that Texas would have to make  
10:58:44 15 a tighter connection in order to justify that request.

16 If the Court has no further questions...

17 THE COURT: No.

18 MS. PERALES: Thank you.

19 THE COURT: Ms. Apter, do you want to weigh in  
10:58:58 20 or one of your helpers weigh in on it?

21 MR. LEVINE: Good morning, Your Honor, Ken  
22 Levine for the state of New Jersey.

23 I want to bring us back to the case or  
24 controversy, first, and then Ms. Wainer, after, will  
10:59:10 25 address the standing, if that is permissible.

1 I did hear your exchange with counsel for  
2 the other intervenors about case or controversy, and let me  
3 see if I can frame it in a little -- differently as to be  
4 helpful to the Court.

10:59:23

5 The Case or Controversy Doctrine identify  
6 a fundamental flaw in this litigation. The federal  
7 defendants are already doing everything in their power to  
8 give the plaintiffs the exact actual relief that the  
9 plaintiffs seek. And the parties do not actually have a  
10 dispute between the two of them that they want this Court  
11 here to adjudicate.

10:59:39

12 Plaintiffs and federal defendants both  
13 contend that DACA is illegal, and both seek to terminate  
14 DACA. And this is not a dispute or a case in controversy.  
15 The original plaintiffs, original parties to this case are  
16 at this table and that table over there, and they both  
17 agree about the legal issues that are at issue here, and  
18 they both want to reach the same conclusion.

10:59:53

19 The alignment of interests of the  
20 plaintiffs and the federal defendants is clear in the four  
21 corners of the amended complaint. In paragraphs 176 to  
22 189, it describes how between June and September 2017, the  
23 plaintiffs demanded that DHS rescind DACA because DACA is  
24 unlawful; that the Executive announce that DHS is

11:00:09

11:00:31

25 rescinding DACA because it is, quote, an unconstitutional



1 exercise of authority by the Executive Branch; and that the  
2 plaintiffs were, quote, satisfied by DHS's rescission.

3 If there is any doubt that plaintiffs and  
4 the federal defendants are aligned, it is eliminated with  
11:00:46 5 the federal defendants filing in Docket 71 where they say  
6 the United States agrees with the state of Texas and other  
7 plaintiffs that the policy known as DACA is unlawful, and  
8 the federal defendants stand up here today and make the  
9 same statements.

11:00:59 10 THE COURT: But aren't they still running DACA?

11 MR. LEVINE: They are still running DACA.

12 THE COURT: They haven't collapsed it.

13 MR. LEVINE: Right, Your Honor. The only  
14 reason they are still running DACA is not based upon any

11:01:08 15 dispute that is between this table and that table over  
16 there. It has to do with court orders in other courts.

17 THE COURT: But if Texas is sustaining damages,  
18 and the other states are sustaining damages from DACA, it  
19 is the program that is causing those damages.

11:01:23 20 MR. LEVINE: I mean, it --

21 THE COURT: And they are running the program.

22 MR. LEVINE: They are running the program only  
23 under court orders from New York and Texas, right.

24 THE COURT: But they are still doing it.

11:01:33 25 MR. LEVINE: But the redress --

1 THE COURT: Just because they don't want to do  
2 it --

3 MR. LEVINE: Right. But there is no case cited  
4 anywhere including *Chadha* or *Windsor* where -- where a party  
11:01:42 5 under duress, under court instruction, under court  
6 injunction, creates a case of controversy because the other  
7 side is suing them.

8 The solution for the plaintiffs is clear,  
9 Your Honor. They can intervene in New York, DC, and  
11:01:58 10 California, and state their position. They can file amicus  
11 briefs. But what they're actually asking this Court to do  
12 is improper. They want this Court to issue an advisory  
13 opinion that would have no actual effect, but they want  
14 this Court to issue an advisory opinion that they can then  
11:02:16 15 shop around to New York, California in the other cases.

16 THE COURT: Well, let me ask you this: I am  
17 sure you have looked at in -- in *Trump vs. Hawaii*, the  
18 concurring opinion by Justice Thomas, and all the other  
19 articles, Harvard Law Review, BU Law Review, Columbia, NYU,  
11:02:39 20 they have all these law articles that say -- about national  
21 injunctions. And one of the criticisms they have about  
22 national injunctions is that it prevents a circuit split  
23 from happening.

24 In other words, those authors and,  
11:02:54 25 presumably, Justice Thomas because he cited some of those

1 articles, thinks it's healthy to have circuit splits. Why  
2 wouldn't it be healthy here to have a circuit split, if I  
3 was so inclined, or if the Fifth Circuit was so inclined?  
4 Not "I." It is up to them.

11:03:13

5 MR. LEVINE: The issue of national injunctions  
6 and the issue about circuit splits are both, with all  
7 respect, fascinating and interesting issues. The -- the  
8 issue of national injunctions does not have anything to do  
9 with here. I mean, if we come back to the basics, Your

11:03:28

10 Honor, this table on the plaintiff, and the federal -- the  
11 table over there with the federal defendants have the same  
12 position and seek the same issue.

13 The unfairness that you're identifying  
14 about the national injunctions, and the -- and the  
15 frustration that this Court feels, I understand. I mean,  
16 this Court handled the DAPA litigation. But this was  
17 Texas's strategic choice to dismiss the DAPA litigation  
18 that was before this Court.

11:03:43

19 THE COURT: Well, it was clear in their -- in  
20 their dismissal order, though, that they were doing it  
21 because the government had agreed to dissolve the program.  
22 I mean, it's stated in the order that was signed by  
23 everybody. Not the order, the file.

11:03:59

24 MR. LEVINE: Right. But that was still their  
25 strategic choice, and they did that, obviously coming back

11:04:15

1 to my basic point, because at that point their position and  
2 the federal defendants' position were exactly aligned.  
3 They wanted the same thing for the same reasons.

11:04:27

4 THE COURT: Why would my order necessarily  
5 conflict if, assuming hypothetically, I did what Texas is  
6 asking me to do, among other things, is to find that the  
7 Fifth Circuit opinion on the DAPA litigation applies to  
8 this program --

9 MR. LEVINE: Right.

11:04:47

10 THE COURT: -- and that it then finds it  
11 illegal; whereas, California, DC, New York, Maryland, all  
12 four of those decisions, even though they don't agree with  
13 each other, all were asked whether the rescission of the  
14 program was actually legal or illegal?

11:05:08

15 MR. LEVINE: Right.

16 THE COURT: I am not being asked that question.

17 MR. LEVINE: Right. So the question you're  
18 being asked is, is the 2012 DACA program legal? That's the  
19 question you're being asked. And, again, I am going back  
20 to the basics. Article III, Section 2, is there a case in  
21 controversy? 2012 DACA memo, this table and that table  
22 completely agree on this, and the federal defendants are,  
23 in fact, doing everything in their power to provide the  
24 exact relief that the plaintiffs are seeking.

11:05:37

25 THE COURT: But they're forbidden to by law

1 and, I assume -- I am going to ask them as soon as you're  
2 done. It is going to be their turn. And I am going to ask  
3 them if they intend to obey those injunctions, which I  
4 assume I am going to get an answer is yes.

11:05:49

5 MR. LEVINE: Right. And this gets into the  
6 redressability issue, Your Honor. So, I mean, are the  
7 federal defendants actually asking this Court to put them  
8 in a conflicted position so that they have to be in  
9 contempt of court, of either this Court or New York or

11:06:01

10 California? And that's not -- that is not a way to redress  
11 the -- the issues that -- with respect to the DACA memo.  
12 The ways to redress them are -- are simple and laid out.

11:06:21

13 The Courts in New York and California have  
14 issued opinions, and issued injunctions regarding the  
15 rescission, which is the exact relief that the plaintiffs  
16 seek, and the redress -- and the way for the plaintiffs to  
17 address those issues are to intervene or to file amicus  
18 briefs in those cases.

11:06:39

19 THE COURT: See, I don't think -- maybe I  
20 misread it and I'll go back and look, but I don't think  
21 they're asking me to rule if it's rescinded.

11:06:52

22 MR. LEVINE: Paragraph 9 of the amended  
23 complaint, they say specifically we're not talking about  
24 the rescission. We are only talking about the 2012  
25 memorandum.

1 THE COURT: So I was right.

2 MR. LEVINE: Right. But then, again, I go back  
3 to the basics. Everyone is in agreement, and these two  
4 tables are in agreement about the 2012 memo.

11:07:01 5 I mean, the plaintiffs saying that it is  
6 not about the rescission is -- is, respectfully,  
7 disingenuous because it is all about the rescission. I  
8 mean, what they are seeking here is improper, is asking  
9 this Court to collaterally attack those other decisions.

11:07:17 10 That is exactly what the counsel for the other intervenors  
11 is talking about. And that gets us back to the *McGinley*  
12 opinion which applied Fifth Circuit case law, just, you  
13 know, extremely extensive discussions about the issues  
14 here.

11:07:35 15 THE COURT: Let me ask you the same question I  
16 asked Mr. Hallward-Driemeier and that was, okay, if that's  
17 the case, why did New York, Maryland, and DC, have -- have  
18 the same problem?

19 MR. LEVINE: New York, Maryland and DC, the  
11:07:50 20 plaintiffs and the defendants --

21 THE COURT: It was the exact same issue that  
22 California had already decided.

23 MR. LEVINE: Well, I mean, now you're getting  
24 to the issue of whether once one injunction is issued,  
11:08:01 25 whether other states can also step in and file.

1 THE COURT: Well, Maryland stepped in and said  
2 it was just fine, go ahead and rescind it.

3 MR. LEVINE: Right. So California files first.  
4 If you are saying, was it improper for New York to file? I  
11:08:12 5 mean, first of all, it is not my issue here. But second, I  
6 mean, New York wants to protect its own interests. That's  
7 one matter.

8 THE COURT: Doesn't Texas want to protect its  
9 own interest?

11:08:23 10 MR. LEVINE: And as a second matter, New York  
11 was seeking relief that was not specifically addressed in  
12 the California case. So New York has every right to bring  
13 that case even after California had.

14 THE COURT: But they have a right and Texas  
11:08:35 15 doesn't?

16 MR. LEVINE: They have a right and Texas  
17 doesn't because Texas, the plaintiffs, and the federal  
18 defendants are aligned, you know, the --

19 THE COURT: But they are not aligned with you.

11:08:44 20 MR. LEVINE: Well, then if the issue is can  
21 an --

22 THE COURT: If they are not aligned with  
23 what --

24 MR. LEVINE: Right.

11:08:49 25 THE COURT: -- the United States is doing, they

1 may not be -- what is it, unaligned? They may not --

2 MR. LEVINE: Misaligned.

3 THE COURT: They may not disagree on what they  
4 would like to do, but they do disagree on what they're  
5 doing.

11:09:05

6 MR. LEVINE: Well, so, first, if the question  
7 is, and I'm not sure it was, whether intervenors can kind  
8 of breathe life into this case, then the law on that is  
9 clearly no. If there is -- if the case itself is dead on  
10 arrival, where there is no case or controversy between the  
11 plaintiffs and defendants, you can't, you know, revive the  
12 dead by bringing in a plaintiff here -- bringing an  
13 intervenor here, I'm sorry. And if you -- we have a -- we  
14 have a case in there that says that, and I don't think --  
15 I'm not sure there is any controversy in that.

11:09:21

11:09:40

16 The -- Your Honor, the plaintiffs and  
17 defendants are not asking this Court to resolve any dispute  
18 between the two of them. The federal defendants are  
19 already doing everything in their power to give the  
20 plaintiffs the actual relief that the plaintiffs seek.

11:09:58

21 The plaintiffs are improperly asking this  
22 Court to issue a ruling to collaterally attack sister court  
23 rulings, and the presence of intervenors cannot serve to  
24 breathe life into a case that lacks summary -- subject  
25 matter jurisdiction.

11:10:13



1 This Court should dismiss for lack of case  
2 in controversy. Thank you.

3 THE COURT: Mr. Shumate, you want to weigh into  
4 this?

11:10:27 5 MS. WAINER APTER: I have something outstanding  
6 but I can wait until Mr. Shumate --

7 THE COURT: No. That's fine. Sorry, I didn't  
8 mean to cut you off. Go ahead.

9 MS. WAINER APTER: So I just want to make two  
11:10:38 10 brief points, Your Honor, that were not covered by  
11 Ms. Perales.

12 One, as you pointed out, Your Honor, Texas  
13 does a good job in its brief of trying to rely on defendant  
14 intervenors witnesses. One of those is Diana Gonzalez, who  
11:10:51 15 is the Deputy Secretary of Higher Education in New Jersey,  
16 and Texas in its reply brief says, you know, even if  
17 Mr. Lopez didn't show that Texas has any education costs  
18 related to DACA grantees, Ms. Gonzalez's testimony shows  
19 that.

11:11:06 20 But Ms. Gonzalez's testimony had  
21 absolutely nothing to do with elementary or secondary  
22 education costs in either New Jersey or Texas. So  
23 Mr. Lopez, the only Texas witness on education costs, is  
24 talking only about elementary or secondary education costs.  
11:11:25 25 He doesn't say anything about whether Texas has any public

1 colleges or universities, how it funds them, whether there  
2 might be any costs that might be attributable to DACA  
3 grantees in those universities. And so Ms. Gonzalez,  
4 therefore, is just no help to Texas.

11:11:41

5 And then the second point, Your Honor, is  
6 in terms of the study from Dr. Wong. So as you recognized,  
7 even if Texas had actually pointed to any healthcare or  
8 education costs that are attributable to DACA grantees, the  
9 claim that these costs would be redressed by a preliminary

11:12:03

10 injunction hinges only on the assertion that these people  
11 would not remain in the country, but for renewal of their  
12 unlawful DACA status.

13 And as Ms. Perales mentioned, Texas's  
14 witness Dr. Lloyd Potter testified at his deposition that  
15 he could only say that more than one DACA grantee -- it  
16 would be reasonable to conclude that more than one DACA  
17 grantee would return to their country of origin if DACA  
18 were terminated.

11:12:16

19 THE COURT: Isn't one enough? I mean, if --  
20 doesn't -- hasn't the Fifth Circuit already said that for  
21 standing purposes, we're not going to do an accounting  
22 deal? If you're damaged, you're damaged.

11:12:30

23 MS. WAINER APTER: No, Your Honor, because  
24 there is no evidence that that one person is actually  
25 costing Texas any money. So, first, Texas hasn't actually

11:12:43

1 pointed to any DACA grantees that are costing it any money  
2 when it comes to education costs, healthcare costs, or law  
3 enforcement costs. But moreover, according to Texas's  
4 witness, Dr. Potter, the DACA grantees who would be most  
5 likely to return to their country of origin if DACA were  
6 terminated are those who are older, one; two, who have  
7 obtained college degrees; and three, have already met their  
8 savings goals.

9 So these people are precisely those that  
10 Texas is unlikely to be incurring any education or  
11 healthcare expenses on behalf of. Obviously, one who is  
12 older, has already obtained a college degree, and has met  
13 savings goals, are by definition not in elementary, middle  
14 or high school in Texas. And it is also extremely unlikely  
15 that such a person would qualify for emergency Medicaid,  
16 Texas's CHIP perinatal coverage, or uncompensated medical  
17 care provided by state public hospitals which are all  
18 available only to low-income families.

19 One other comment about Texas's attempt to  
20 rely on Dr. Wong's survey. So Dr. Wong asked DACA grantees  
21 if they were aware that the Attorney General of Texas and  
22 nine other attorneys general had threatened to amend their  
23 lawsuit to challenge DACA if the United States government  
24 did not rescind. And he then asked what the DACA grantee  
25 -- whether the DACA grantee would leave the country if DACA

1 were ultimately rescinded. And as you pointed out, 22  
2 percent answered that they would.

3 But, in that question, the survey was  
4 asking someone how they would respond to a particular  
11:14:31 5 stimulus, and people do not always respond to a stimulus in  
6 the way that they predicted that they would. So, for  
7 example, DACA grantee Daniela Velez told a newspaper in  
8 February 2018 that she and her sister would leave the  
9 United States and return to Venezuela if Congress did not  
11:14:52 10 extend DACA by March of 2018. But when she was questioned  
11 about this at her deposition, Ms. Velez testified that she  
12 changed her mind, partly because she saw the deterioration  
13 of the political party in Venezuela and she realized that  
14 it was not safe to return.

11:15:08 15 And so the point there is just it -- the  
16 question was asking people to predict how they would behave  
17 in a particular circumstance and people don't necessarily  
18 predict their behavior accurately. More importantly,  
19 though, as I mentioned, according to Mr. Potter, it is  
11:15:22 20 exceedingly unlikely that if any DACA grantee in Texas were  
21 to leave because DACA were terminated, that that person  
22 would be anyone who was costing the state any money.

23 Instead, DACA grantees who are older, have  
24 obtained college degrees, and have met savings goals are  
11:15:40 25 precisely those who are most likely to be benefitting Texas

1 in all of the ways that we outline in our brief and that  
2 the amicus briefs outline.

11:16:00

3 THE COURT: Ms. Apter, before you sit down --  
4 well, you don't have -- you don't need your notebook for  
5 what I am going to ask you.

6 I see your boss is in the room. Do you  
7 want to introduce him?

11:16:13

8 MS. WAINER APTER: Sure. I would love to  
9 introduce the Attorney General of New Jersey, Gurbir  
10 Grewal.

11 ATTORNEY GENERAL GREWAL: Good morning, Your  
12 Honor.

13 THE COURT: Good morning, General Grewal. Glad  
14 to have you here.

11:16:18

15 I assume most people know General Paxton,  
16 who is else here.

17 ATTORNEY GENERAL PAXTON: Good morning.

11:16:28

18 THE COURT: Most Texans do. But I wasn't sure  
19 they realize who General Grewal was, and we are pleased to  
20 have him down here.

21 ATTORNEY GENERAL GREWAL: Thank you, Judge.

22 MS. WAINER APTER: Thank you, Your Honor.

23 THE COURT: Mr. Shumate.

11:16:43

24 MR. SHUMATE: Thank you, Your Honor. I don't  
25 think there's any question that this is a case or

1 controversy within the meaning of Article III of the  
2 Constitution. I think there are three Supreme Court cases  
3 that squarely foreclosed all the arguments in the  
4 Intervenor's motion to dismiss: *Chadha*, *Windsor*, and  
5 *Chafin* case.

11:16:54

6 First, *Chadha* and *Windsor* stand for the  
7 proposition that simply because the Attorney General agrees  
8 with the plaintiff on the merits of a dispute doesn't  
9 render the case not a -- case or controversy. So in  
10 *Chadha*, there was a case where the Attorney General agreed  
11 that the Line Item Veto Act was unconstitutional, but the  
12 Supreme Court said that just because the plaintiffs and the  
13 defendants agree doesn't deprive the Court of jurisdiction  
14 if the decision will have real meaning and if there's  
15 adversariness to the proceeding. Same thing in the *Windsor*  
16 case.

11:17:07

11:17:22

17 And in this case, as you mentioned, the  
18 Federal Government continues to operate the DACA program or  
19 policy pursuant to the Court orders. Texas claims that  
20 they are injured by that, so we are doing the thing that  
21 they claim that they are injured by. So a decision by the  
22 Court would have real meaning. There is an adversary  
23 process here, just like in the *Windsor* case and in the  
24 *Chadha* case, because in those cases, Congress was -- was  
25 defending the statute. In this case, the Intervenor's are

11:17:33

11:17:46

1 fully and aggressively defending the DACA policy.

2 I'd like to also respond to the  
3 Intervenor's argument that we're aren't doing enough to  
4 make arguments in this case or that we're frustrating the  
11:18:00 5 Court by not providing enough discovery. On the merits,  
6 Your Honor, we think the merits are controlled by the Fifth  
7 Circuit's precedent in the DACA case, as well as your own  
8 prior decision in that -- in that case. So we believe we  
9 are foreclosed from making a number of arguments, and that  
11:18:13 10 is in part why the Attorney General advised DHS that DACA  
11 should be rescinded.

12 And on the discovery issues, Your Honor,  
13 it's always in the Federal Government's interest to oppose  
14 depositions of our witnesses and things like that; however,  
11:18:25 15 if you remember from the first hearing, I asked the Court  
16 to preclude discovery of the federal defendants, and you  
17 denied that.

18 The plaintiffs went to the Court and asked  
19 for opportunities to conduct discovery of the federal  
11:18:35 20 defendants, and we provided a number of documents and  
21 witnesses. Plaintiffs never came to the Court and filed a  
22 motion to compel or sought the deposition of Donald Neufeld  
23 or other federal witnesses. So we are simply litigating  
24 this case according to the interests of the United States.

11:18:51 25 THE COURT: Thank you, sir.

1 Mr. Disher, if you will, please, sir.

2 MR. DISHER: Yes, Your Honor. I want to start  
3 with the jurisdictional pieces. And in particular, the  
4 intervenors make two arguments, one about the adversarial  
11:19:11 5 nature of this proceeding, and then the second is about  
6 redressability.

7 In terms of the adversarial nature of this  
8 proceeding, *Chadha* and *Windsor* clearly foreclose their  
9 arguments. In those cases, as the Federal Government  
11:19:24 10 explained, the -- the Federal Government was still going to  
11 continue the activity that the plaintiffs were complaining  
12 about, and the Court, the Supreme Court, clearly held that  
13 there was, in fact, an adversarial relationship there, and  
14 any concerns about whether there would be kind of a  
11:19:42 15 prudential full fleshing out of the merits was satisfied by  
16 the presence of intervenors, which is, of course, the exact  
17 situation we have here. And as Mr. Shumate said, any  
18 concerns about not getting enough information from the --  
19 from the federal defendants should have been resolved  
11:19:57 20 through motions to compel or the like.

21 So in terms of adversarialness, we think  
22 that that is certainly not a bar to the Court hearing this  
23 case.

24 On redressability, there are a couple of  
11:20:10 25 points to make. First is to acknowledge that there is not



1 currently an injunction that requires DHS to accept new  
2 DACA applications or new applications for advance parole.  
3 And so any relief issued by this Court preventing those two  
4 governmental activities would not conflict with a pending  
11:20:32 5 injunction. And even in the DC court case, which the order  
6 takes effect in 15 days, that is not an injunctive order;  
7 it is simply vacating the rescission that happened in 2017.  
8 And that really goes to the core question here, which is,  
9 our rights as Plaintiff States to seek redress for the  
11:20:54 10 injuries that we claim over one Executive action, i.e. the  
11 2012 memo cannot be circumscribed by challenges to a  
12 different Executive action, i.e., the 2017 attempt to  
13 rescind that memo. Those are different claims by different  
14 parties over a different Executive action pending in  
11:21:14 15 different courts subject to different jurisdictional  
16 precedent.

17                   Additionally, as Your Honor noted, four --  
18 no less than four of those courts have now ruled on the  
19 2017 rescission memos, so even if this case arguably did  
11:21:30 20 involve that -- that decision, which it does not, none of  
21 those other four cases -- four courts felt that their  
22 jurisdiction was restricted in any way. So the intervenors  
23 contend that this Court is the only one without  
24 jurisdiction and the Plaintiff States are the only ones  
11:21:46 25 without standing, and that simply cannot be right.

1 In terms of standing, Your Honor, you  
2 asked a very pointed question about what is the standard  
3 here. And as states, the Supreme Court has made clear that  
4 we are due special solicitude. And before I get into the  
5 specific facts of our case, I just want to remind the Court  
6 of the facts in *Massachusetts vs. EPA*, a case in which the  
7 United States Supreme Court found a state had standing to  
8 sue the Federal Government.

9 Massachusetts sued the EPA for its alleged  
10 failure to properly regulate the emissions from new cars  
11 that were being sold. Massachusetts did not contend that  
12 no new cars should be sold, but they contended that EPA's  
13 failure to regulate its emissions perhaps marginally  
14 increased the amount of emissions that would come from new  
15 cars. Those additional marginal increase in emissions  
16 would potentially cause an increase in global temperatures,  
17 which would potentially cause a rise in sea levels, which  
18 would potentially cause a decrease of the Massachusetts  
19 coastline.

20 And despite all of those potentialities  
21 and despite all of those marginal effects that may add up  
22 in the long link of causal connection, the Supreme Court  
23 found that the state had standing to sue the Federal  
24 Government.

25 In this case, Your Honor, the facts are

1 much easier for this Court to decide on any three of our  
2 bases for standing: First, as to educational, healthcare,  
3 and law enforcement expenses, the intervenors are perhaps  
4 misunderstanding our argument.

11:23:40

5 Our argument is a two-step argument. The  
6 first step is: These states are, in fact, incurring these  
7 expenses to provide these types of services to DACA  
8 recipients. There is not a single witness that disputes  
9 that fact. Some of the witnesses may quibble about how

11:23:58

10 much is spent to provide these services, but nobody says  
11 that the state does not incur an expense to provide  
12 education to DACA recipients, nobody says that the state  
13 does not incur an expense to provide healthcare to DACA  
14 recipients, and nobody says that the state does not incur  
15 an expense to provide law-enforcement services to DACA  
16 recipients.

11:24:15

17 And, in fact, as Your Honor pointed out,  
18 Dr. Perryman himself estimated what that -- what that cost  
19 was, and it was over \$250 million each year just to the  
20 State of Texas. Any attempts to say that that number is  
21 not valid overlooks the fact that the intervenors  
22 themselves cite to Dr. Perryman his declaration in  
23 Paragraph 39, and that estimate, that \$250 million  
24 estimate, is a basis for Dr. Perryman's testimony sponsored  
25 by the intervenors, cited in Paragraph 39 of his

11:24:31

11:24:53

1 declaration. So that's the first step. There is, in fact,  
2 a cost being incurred by the states to provide these  
3 services.

4 But then the second step is: How does  
11:25:03 5 that relate to DACA? Yes, the state has the obligation to  
6 provide some of these services to all the people in the  
7 state, no matter their immigration status, so we have to go  
8 to the Step 2, which is: What effect does DACA have on  
9 those costs? And, again, the testimony is clear in this  
11:25:21 10 case that DACA provides an incentive for some amount of  
11 DACA recipients to remain in the Plaintiff States.

12 Nobody -- again, nobody disputes the fact  
13 that if DACA -- rather, let me say it a different way.

14 Nobody testified that if DACA ends, not a  
11:25:39 15 single DACA recipient will leave the state. Nobody  
16 testified to that. And, again, as our demographer  
17 testified, and as Dr. Wong's survey results show, that is  
18 something that is likely to happen.

19 So if you add up the fact that the costs  
11:25:57 20 we incur are not disputed and the fact that some DACA  
21 recipients are likely to leave, the -- the costs incurred  
22 by the states for healthcare, education, and  
23 law-enforcement services is a much tighter causal  
24 connection than the Supreme Court found supported standing  
11:26:12 25 in *Massachusetts vs. EPA*.

1                   On our second standing, again, under --  
2 under the framework of *Massachusetts vs. EPA*, the evidence  
3 shows that employers have indeed hired DACA recipients; and  
4 if DACA did not exist, those recipients would not be  
11:26:29 5 authorized to work. And then again, another step even  
6 further than that, the evidence shows if DACA ends, those  
7 companies will make an attempt to hire people who are here  
8 either as citizens or -- or lawfully present workers  
9 pursuant to Congress's carefully crafted plan about  
11:26:48 10 employment authorization.

11                   So, again, the record in -- the record in  
12 front of you is clear that DACA is violating those  
13 Congressional work authorizations.

14                   THE COURT: Where is that evidence?

11:27:02 15                   MR. DISHER: Yes, Your Honor. It's, again,  
16 the -- the Texas Association of Business submitted an  
17 amicus brief that details the number -- a number of  
18 different Texas-based companies and a specific number of  
19 DACA recipients employed by those companies. And then it  
11:27:17 20 goes one step further and says those companies will incur  
21 an expense if DACA ends to try to find replacements for  
22 those workers. And, again, also that evidence is included  
23 in some of the declarations submitted by the intervenors  
24 filed in the California lawsuit, specifically by Apple and  
11:27:36 25 Univision. And then, of course, also there's evidence from

1 our own economist, Dr. Donald Deere, who makes that -- that  
2 statement as well.

3 And then lastly, Your Honor, any attempt  
4 to -- any attempt to cast doubt upon our standing similarly  
11:28:07 5 overlooks this Court's prior holding that the state has  
6 abdication standing in this case to sue the Federal  
7 Government, and specifically the Executive Branch, for its  
8 massive abdication of Congress's duly enacted laws, and  
9 that is only more clear in this case due to the use of  
11:28:26 10 advance parole, which does allow some DACA recipients a  
11 pathway to citizenship that they would not have but for  
12 DACA. That is a direct violation of Congressional  
13 statutes, and we, as a state, have standing to -- to seek  
14 redress for that abdication.

11:28:42 15 THE COURT: Why does it matter if the companies  
16 incur expenses to hire new people?

17 MR. DISHER: Your Honor, it doesn't matter that  
18 the company incurs expenses, but their statement that they  
19 will incur expenses is proof that if DACA ends, they will  
11:28:55 20 attempt to hire citizens or lawfully present workers  
21 pursuant to Congress's carefully crafted  
22 employment-authorization statute -- or statutes, and  
23 that -- and those statutes are what DACA does away with.  
24 DACA is a violation of those statutes because it grants  
11:29:12 25 work authorization to people who Congress has not

1 determined should have work authorization.

2 THE COURT: I mean, couldn't people assume just  
3 the opposite, that, therefore, by keeping DACA, all these  
4 companies would save those expenses?

11:29:26 5 MR. DISHER: If the -- I'm -- I'm sorry. I  
6 don't understand your question.

7 THE COURT: Well, if they're going to incur  
8 these expenses in hiring new people to replace the DACA,  
9 wouldn't they save money if we kept DACA and they employed  
10 the DACA people?

11 MR. DISHER: Oh, Your Honor, I understand what  
12 you're saying; but, again, our focus here is not on the  
13 harm to the companies. It's on the harm to the citizens  
14 and other lawfully present workers in our states. And we,  
11:29:53 15 as states, have parens patriae standing to protect those  
16 citizens and other lawfully present workers to -- for them  
17 to realize the benefits of Congress's plan. And DACA has  
18 done away with Congress's plan, so we have standing to sue  
19 the Federal Government to protect those rights for our  
11:30:12 20 citizens.

21 THE COURT: Let me ask you why -- why didn't  
22 you allege the driver's license costs?

23 MR. DISHER: Yes, Your Honor.

24 THE COURT: I mean, I have to tell you my law  
11:30:20 25 clerks and I are going, Why?

1 MR. DISHER: Your Honor, it's a difference of  
2 degrees. In DAPA, we were looking at an influx, in Texas  
3 alone, of a million potential new driver's license  
4 recipients. We understand that with DACA, the DACA  
5 recipients largely already have driver's licenses, and they  
6 pay a \$24 fee to renew their licenses.

11:30:36

7 THE COURT: What about the 500 to a million  
8 DAPA people waiting out there?

9 MR. DISHER: That is -- that is certainly  
10 something that we could potentially look at; however, at  
11 this point --

11:30:51

12 THE COURT: I'm not encouraging you to look at  
13 it.

14 MR. DISHER: Right, but at this point, Your  
15 Honor, based on the facts as they exist today and the  
16 people who have driver's licenses, and more importantly,  
17 the -- the clear acknowledgment that we do incur other  
18 expenses to provide other services, we don't need driver's  
19 license costs in this case to support our standing.

11:30:59

20 THE COURT: All right. Here is what I'd like  
21 to do. I'd like to take about a ten-minute break. I'm  
22 going to come back. We're going to start on the merits.

11:31:16

23 And, Mr. Disher, that means your side  
24 starts because you're the one asking for the injunction.

11:31:26

25 Let's take about a ten-minute break.



1 Thank you.

2 THE LAW CLERK: All rise.

3 (Proceedings recessed from 11:31 to 11:48.)

4 COURT SECURITY OFFICER: All rise.

11:48:42

5 THE COURT: All right. Be seated.

6 All right. Mr. Disher, let's talk about  
7 the merits of your request for an injunction. And I think  
8 we just take them right through the elements, and so when  
9 we talk about likelihood of success, we're going to talk  
10 about, you know, the actual merits of the claims. And then  
11 we'll just take them, each of the four elements, and then  
12 we'll let the response come through.

11:48:57

13 MR. DISHER: Yes, Your Honor. And just to  
14 preview for the Court, if we talk about the form of the  
15 specific relief that were requested, Mr. Starr is prepared  
16 to talk about that today.

11:49:13

17 THE COURT: That's fine.

18 MR. DISHER: But in terms of the -- the  
19 preliminary injunction factors, first, of course, is  
20 substantial likelihood of success on the merits. It is no  
21 surprise that it is the State's position this case and this  
22 Court is bound by Fifth Circuit precedent from the  
23 predecessor lawsuit that enjoined not only DAPA but  
24 the exp- -- but the expansion of DACA as well.

11:49:24

11:49:41

25 In the postdiscovery briefing, I have seen

1 three attempts to distinguish DAPA and DACA; but, again,  
2 no -- no attempts to distinguish expanded DACA and DACA.  
3 But in terms of the distinctions between DAPA and DACA,  
4 intervenors first point to the pathway to citizenship that  
5 certain potential DAPA recipients may have had. The Fifth  
6 Circuit does spend some time discussing that; however, that  
7 fact only proves our case. It only makes our case  
8 stronger.

9 First of all, the pathway to citizenship  
10 provided to some of the potential DAPA recipients did not  
11 apply to all of the DAPA recipients, and yet this Court and  
12 the Fifth Circuit found that DAPA en masse was unlawful as  
13 it applied to all potential DAPA recipients.

14 Similarly, Your Honor, the fact that there  
15 was a pathway to citizenship for certain DAPA recipients  
16 only means that the lack of such a pathway to citizenship  
17 for DACA recipients moves this case farther away from  
18 Congress's statute. Congress has not spoken on this  
19 specific population, and so the lack of that pathway means  
20 that DACA is, in fact, farther away from Congress's  
21 carefully crafted plan.

22 The second distinction that intervenors --  
23 THE COURT: Didn't you argue the opposite  
24 conclusion from that point?

25 MR. DISHER: Well, Your Honor, no. We think

1 that -- that the -- that our conclusion is the correct  
2 conclusion to reach, because as the Fifth Circuit found,  
3 there are certain other statutory mechanisms, and the  
4 Executive Branch has indeed, in the past, exercised  
5 prosecutorial discretion for people who would then  
6 eventually qualify for those different types of immigration  
7 status.

8                   That same analogy could be said for the  
9 pathway to citizenship for potential DAPA recipients, that  
10 DAPA was, in fact, this bridge that the Fifth Circuit  
11 termed it; but regardless of that, DAPA, of course, would  
12 have applied to people who did not qualify for that pathway  
13 to citizenship, and the Fifth Circuit still enjoined all of  
14 DAPA all together.

15                   The second distinction that the  
16 intervenors try to draw between DAPA and DACA is the number  
17 of potential recipients, but their own witness, as cited in  
18 our briefing, acknowledges that the number of recipients is  
19 not a legal basis to distinguish DAPA and DACA. Both  
20 programs grant lawful presence and work authorization to  
21 groups of people that Congress has not granted either  
22 lawful presence or work -- work authorization to. And the  
23 fact that one may have applied to 4 million people while  
24 another may have applied to 1.4 million people is not a  
25 legal distinction between the two programs.

1 And then the third distinction that the  
2 intervenors offer is the age of the potential recipients of  
3 DACA and DAPA. DACA, of course, applies to a younger  
4 potential population, but that does not mean that DACA  
5 still, in effect, violates Congress's carefully crafted  
6 plan in terms of bestowing lawful presence and work  
7 authorization. So simply the age of the recipients of the  
8 two programs, again, is not a legal distinction.

9 Now, the intervenors also try to draw a  
10 distinction between the predecessor case and this one in  
11 terms of the amount of discretion that is being exercised  
12 by the individual Immigration Service officers in  
13 adjudicating DACA applications versus DACA -- DAPA  
14 applications.

15 First of all, Your Honor, discretion  
16 exercised by individual service -- Immigration Service  
17 officers is not relevant to our Take Care Clause claim, and  
18 it is not relevant to our claim that DACA violates the  
19 substance of the APA, as the Fifth Circuit found. And even  
20 in terms of the procedural violation of the APA, this Court  
21 can rule that DACA violated the APA's procedural  
22 mechanisms, even without determining whether an individual  
23 Immigration Service officer exercised discretion, and  
24 that's because DACA bestowed legal benefits and substantive  
25 rights upon its recipients; therefore, it was indeed

1 subject to notice and comment and rule making, even without  
2 determining the amount of applications that were actually  
3 denied.

4 But as I showed you earlier today, USCIS  
11:54:30 5 cannot identify a single application that was, in fact,  
6 denied for pure discretion, and the Texas Service Center,  
7 which has adjudicated 76,000 DACA applications, similarly  
8 confirmed that such denials simply did not happen.

9 So on the merits, Your Honor, this case is  
11:54:48 10 firmly controlled by Fifth Circuit precedent, precedent  
11 that requires that DACA is not only violative of the  
12 procedural aspects of the APA, but it also violates the  
13 substance of the APA. And we believe that the evidence  
14 also shows that DACA is, in fact, a violation of the  
11:55:08 15 Executive's duty to take care that Congress's laws are  
16 faithfully executed.

17 Moving to the next preliminary injunction  
18 factor, irreparable harm, I just want to make one thing  
19 clear about this factor. The factor does not require the  
11:55:28 20 State to show that there will be some massive impending  
21 doom that will happen without a preliminary injunction.  
22 The State has to show simply that its harm is irreparable.

23 Your Honor, the amount of money that the  
24 State spends to provide services to DACA recipients will  
11:55:47 25 not come back. The State cannot sue to get that money

1 back. And the competitive injury suffered by the State's  
2 citizens and other lawfully present workers in terms of  
3 competing with DACA recipients for jobs, likewise, is not  
4 subject to monetary relief. And that doesn't even mention  
11:56:08 5 the harm that the State suffers from the violation of the  
6 separation of powers and the Executive's failure to enforce  
7 Congress's duly enacted, carefully crafted immigration  
8 scheme, that abdication on a massive scale.

9 And then finally, Your Honor, in terms  
11:56:27 10 of both balancing of the equities and the public  
11 interest --

12 THE COURT: Wait, wait. Let's go back to  
13 likelihood of success.

14 While it doesn't necessarily fit under the  
11:56:39 15 title of "likelihood of success," most courts look at the  
16 fact of whether the plaintiff who is seeking an injunction  
17 acted promptly to get relief, and -- and some courts have  
18 held that delay, in and of itself, destroys likelihood of  
19 success.

11:57:04 20 How do we get around the fact that DACA  
21 came into existence in June of 2012 and a suit wasn't filed  
22 until, what, April or May of this year?

23 MR. DISHER: Your Honor, the states should not  
24 be punished for our prudence. When DACA was first  
11:57:20 25 announced in 2012, we certainly had concerns about its

1 unlawfulness at that time, but the true scope and effect of  
2 DACA and the rights and benefits unlawfully granted to its  
3 recipients did not ultimately become clear until the suit  
4 over DAPA and expanded DACA in 2014 and early 2015.

11:57:42

5 At that point, we had a pending piece of  
6 litigation over these very issues, which was quickly  
7 appealed to the Fifth Circuit after this Court granted the  
8 injunction. As soon as that appeal came back down to the  
9 states, we told -- well, actually, let me back up.

11:58:01

10 As soon as the appeal came back down to  
11 the trial court level, the federal defendants were the ones  
12 who asked for the stay and asked for the delay to allow for  
13 a new election and a new administration to come in.  
14 Eventually, it got to the point where the delay was lasting  
15 too long, so we told the federal defendants we are going to  
16 sue you unless you rescind DACA. On that deadline, the  
17 federal defendants did attempt to rescind DACA. And we  
18 brought this lawsuit after the DC court had entered an  
19 order vacating that rescission.

11:58:16

11:58:35

20 If the Court will remember, at our initial  
21 scheduling conference, we asked for relief by July 23rd  
22 because that was initially the date that the DC court  
23 judgment was going to take effect. Now, we are here today  
24 with a new shot clock, April -- or excuse me --

11:58:52

25 August 23rd. In 15 days, that DC court opinion is going to

1 take full effect, and so we are asking for an injunction  
2 now to prevent that unlawful program from coming back into  
3 full existence.

11:59:12 4 THE COURT: Let me drop back, though. I mean,  
5 the damages you've alleged connected with DACA, I mean,  
6 didn't they occur in 2012, 2013, 2014, 2015, 2016, 2017?

7 MR. DISHER: They did, indeed, Your Honor, and  
8 we are in no way saying that were not harmed prior to our  
9 filing of -- of this lawsuit; but, again, the full scope of  
11:59:37 10 the program and the amount of harm that we were suffering,  
11 again, did not start to become apparent until late 2014,  
12 early 2015, and at that point, we already had a pending  
13 case in this Court over the -- the new program that was  
14 going to come into existence that would have caused many of  
11:59:55 15 the same harms but on a much larger -- larger scale.

16 So as states, we determined that we should  
17 first challenge that program because of its impending  
18 nature; and as soon as the Supreme Court equally affirmed  
19 the injunction on that program, we told the federal  
12:00:12 20 defendants, We are going to sue you over DACA, the  
21 underlying 2012 memo.

22 So, Your Honor, lastly, in terms of  
23 balancing of the equities and the public interest, the  
24 intervenors and certainly the amici who have filed briefs  
12:00:34 25 in this case point to three different categories of things



1 that should be considered in balancing of the interests --  
2 or balancing of the equities and -- and the public  
3 interest.

4                   They point to, first, economic activity  
12:00:48 5 that occurs because of DACA recipients' ability to work in  
6 the states. They point to the alleged reliance interest by  
7 DACA recipients on the continuation of the program. And  
8 then -- well, let's take those -- those one at a time.

9                   So first, in terms of the economic  
12:01:08 10 activity, again, as I said in my opening, no amount of  
11 economic activity makes lawful what is otherwise unlawful.  
12 What their real complaint is -- is with the policy  
13 underlying the Congressional statutes. If they think that  
14 that policy should change, they are free to lobby their  
12:01:26 15 legislators to change that policy; but just simply the fact  
16 that economic activity may occur because of some unlawful  
17 activity does not mean that that activity then becomes  
18 lawful and should be countenanced -- its continu- --  
19 continuation should be countenanced.

12:01:44 20                   First, the -- or second, the alleged  
21 reliance interest is undercut by their own argument that  
22 DACA is revokable at any time, and so they cannot really  
23 say that they should be given --

24                   THE COURT: Apparently, it's not.

12:01:55 25                   MR. DISHER: Correct, Your Honor, but they have

1 made that argument, and that is one of their arguments for  
2 the merits of why DACA is lawful. And so that argument  
3 directly undercuts this later argument that -- that now,  
4 somehow they have a continuing reliance interest on it.

12:02:11

5 And then the third factor they point to is  
6 some alleged public-safety benefit. Again, the evidence  
7 that they presented to you is not competent evidence,  
8 because the folks who have testified about that have not  
9 done surveys, have not talked to a number of DACA

12:02:27

10 recipients, and as you'll see is pointed out in our  
11 response brief, simply is not competent evidence for the  
12 Court to make that finding. But even if that finding could  
13 be made, public safety alone, once again, does not make  
14 lawful what is other- -- otherwise unlawful, and all of  
15 their law enforcement witnesses recognize and acknowledge  
16 that fact. Just because an individual law-enforcement  
17 officer may think that doing something unlawful would make  
18 his or her community safer doesn't mean that the  
19 law-enforcement officer can do that unlawful activity.

12:03:02

20 So, again, Your Honor, we believe that in  
21 terms of the balancing of the equities and the public  
22 interest, an injunction is due to the Plaintiff States.

23 THE COURT: All right. Thank you, Mr. Disher.

24 Go ahead.

12:03:17

25 MR. STARR: Brantley Starr, for the Plaintiff

1 States, here to briefly talk about the remedy, which we  
2 would only get to if you have jurisdiction, and we've heard  
3 today you are the only court who doesn't; and if we have  
4 standing, and we have heard we are pretty much the only  
12:03:32 5 state who doesn't. Be that as it may, we think that the  
6 remedy in this case is still appropriate to be a nationwide  
7 injunction, even in light of the ongoing debate that you  
8 alluded to earlier. So we wanted to give you our cohesive  
9 theory of when such an injunction is appropriate or not.

12:03:47 10 Under 5 U.S.C. 705, that's a section of  
11 the APA that covers preliminary relief. And it says, "On  
12 such conditions as may be required, to the extent necessary  
13 to prevent irreparable injury, the reviewing court... may  
14 issue all necessary and appropriate process to," one,  
12:04:01 15 "postpone the effective date of agency action," which was  
16 the basis for your earlier injunction on DAPA; or, two, "to  
17 prefer" [sic] -- "to preserve the status or rights pending  
18 conclusion of the review proceedings."

19 That was more akin to your injunction  
12:04:14 20 related to expanded DACA and to the injunction that we are  
21 requesting here. It's a government program that's  
22 currently in effect that will cause irreparable harm to the  
23 parties, to the Plaintiff States specifically, and you can  
24 and should issue preliminary injunctive relief to prevent  
12:04:30 25 that irreparable harm.

1 THE COURT: Let me -- let me ask you a question  
2 about that. Now, let's -- let's set aside for a minute the  
3 New York and California and D.C. and Maryland for right  
4 now. Don't I have a lot different fact situation here than  
5 I did there? I mean, in the DAPA case, I had 26, 27 states  
6 that were, you know, over 50 percent of the population of  
7 the United States that covered 11 out of the circuits,  
8 where here I only have what, seven states?

9 MR. STARR: Our coalition is at ten, but yes.

10 THE COURT: So wouldn't the argument for a  
11 nationwide injunction be less?

12 MR. STARR: Well, it would still be there  
13 because of the right to travel, Your Honor. That  
14 constitutional right to travel is why we don't have check  
15 points between Texas and Oklahoma. We welcome Californians  
16 with open arms. We do so --

17 THE COURT: We ought to have a checkpoint  
18 between Texas and Oklahoma.  
19 (Laughter.)

20 MR. STARR: Appreciate that, Your Honor, and  
21 perhaps around the time of the Red River Rivalry, we could  
22 do so.

23 What I would say, Your Honor, though, is  
24 let's take that -- you have seized on the question here on  
25 whether or not an injunction is appropriate to ten states,

1 nationwide, and why it might be different than the  
2 travel-ban case or the DOJ sanctuary cities case. It's  
3 about the right to travel.

4                   Let's take a hypo of a resident in  
12:05:56 5 California, Your Honor, who gets a DACA permit. If you've  
6 issued a ten-state injunction, they can still travel to  
7 Texas and impose the irreparable harms we have evidence of  
8 that we've talked about earlier. That right to travel  
9 means that a ten-state injunction simply won't avoid the  
12:06:10 10 irreparable harm that 5 U.S.C. 705 says you are authorized  
11 to prevent. That is different, completely different, Your  
12 Honor, than a situation like travel ban or the DOJ  
13 sanctuary cities case.

14                   Travel ban, if you remember, that was  
12:06:23 15 Washington State, for example, arguing that individuals  
16 outside the United States were admitted to go to the  
17 University of Washington. They couldn't get back in  
18 because of the travel ban. So what happens? Well, a court  
19 could fashion a remedy, a preliminary injunction that lets  
12:06:39 20 anyone with those substantial connections to the United  
21 States back in. You know what? That's exactly what the  
22 U.S. Supreme Court did last summer.

23                   We all know the current Justice Thomas  
24 opinion from Travel Ban 3.0, but Travel Ban 2.0, we saw  
12:06:53 25 what the full nine justices thought of the very broad

1 injunction that was issued in travel ban. And they lifted  
2 it for everybody but those with a substantial connection,  
3 like a person who was admitted to the University of  
4 Washington. So Washington can't compel people from coming  
5 to Texas pursuant to the travel ban because those  
6 individuals have no right to be admitted to the University  
7 of Washington. The right to travel is a domestic right,  
8 not an international right, Your Honor. So that's why  
9 travel ban is a different case than this one.

10 That's also true in the sanctuary cities  
11 case involving Department of Justice funding. That's  
12 currently a hot topic in Seventh Circuit. We know Chicago  
13 sued. They won an injunction against a restriction on  
14 law-enforcement grant funds that were going to Chicago.

15 The question is: How do you treat that? Do you treat it  
16 as applying to Chicago, or applying nationwide?

17 The district court applied it nationwide.  
18 The Seventh Circuit agreed, but then the Seventh Circuit is  
19 granted rehearing on the question of that scope. And I  
20 would submit to you that Chicago can't prevent irreparable  
21 harm to itself by mandating that that restriction comes off  
22 of funds to Texas. There's simply no nexus there, Your  
23 Honor. The right to travel is that nexus that connects our  
24 ten Plaintiff States to every other state in the union, and  
25 that's why an injunction was upheld in the DAPA case and

1 why we believe it's appropriate, even in light of  
2 injunctions not being permissible on that same type of  
3 scope for travel ban or the sanctuary cities DOJ case.

4                   So we believe that the appropriate  
12:08:18 5 preliminary injunctive relief, Your Honor, is a request for  
6 the federal defendants to not take any new action on DACA  
7 permits, renewals, or advance parole, and that should be  
8 nationwide and focused. And that incidental benefit to the  
9 other states is perfectly allowable as long as that relief  
12:08:33 10 is there to prevent irreparable harm to the Plaintiff  
11 States, and that's the case here with our ten-state  
12 coalition.

13                   One thing, Your Honor, I'd like to preview  
14 for is future relief in this case. Final relief can look  
12:08:44 15 different under the APA than preliminary relief can. We  
16 appreciate your ruling earlier in this hearing on not  
17 converting this to an MSJ. At this point in time, if we  
18 were to be here today asking you for final relief, we might  
19 not ask for an injunction. We might ask for a vacatur.  
12:09:01 20 And that's --

21                   THE COURT: I'm sorry?

22                   MR. STARR: A vacatur, Your Honor, to set it  
23 aside. That's under 5 U.S.C. 706. The wording of that  
24 section is completely different than preliminary relief in  
12:09:12 25 Section 705. It says that the appropriate course of action

1 is to set aside an unlawful rule. That is what the D.C.  
2 court did last Friday. They set aside the rescission memo  
3 and said, We're not touching on this debate on nationwide  
4 injunctions because it's simply a vacatur, a set-aside.

12:09:28

5 We believe that the Court would have the  
6 power to enjoin under 706, that Congress hasn't displaced  
7 the Court's equitable powers with the words it chose, but  
8 that given the facts that we're seeing today, it looks like  
9 the relief we may request in the future. The final relief

12:09:41

10 would simply be a set aside or a vacatur of 2012 DACA.

11 If there are no further questions on a  
12 remedy, then we will yield our time.

13 THE COURT: Thank you.

14 MR. STARR: Thank you.

12:09:50

15 THE COURT: Ms. Perales, you want to weigh in  
16 on the merits of the injunction request?

17 MS. PERALES: I wasn't sure if we were  
18 following the order with the Federal Government next.

19 THE COURT: Oh. It matters not to me.

12:10:08

20 MR. SHUMATE: Your Honor, just four quick  
21 points on the merits here. First, DACA is substantively  
22 unlawful for the same reasons that the Fifth Circuit found  
23 that DAPA and expanded DACA are substantively unlawful  
24 under the INA. And we think the Fifth Circuit's opinion

12:10:23

25 controls the merits questions here, not least in part



1 because the Fifth Circuit and this Court look to the  
2 implementation of DACA to determine the lawfulness of DAPA  
3 and expanded DACA. There is simply no statutory basis in  
4 the INA for the government to grant an open-ended reprieve  
5 from removal and work authorization to an entirely new  
6 category of illegal aliens, particularly when Congress had  
7 declined to grant that type of relief in -- in any  
8 legislation.

9                   The second point I'd like to make is on  
10 the plaintiffs' constitutional claims. We don't think it  
11 would be appropriate for the Court to rule on a  
12 constitutional basis. The Fifth Circuit didn't rule on the  
13 Take Care Clause issue in -- in the DAPA decision because  
14 there was a statutory basis for relief in that case. And  
15 likewise here, the Court can rule that DAPA -- excuse me --  
16 DACA is substantively unlawful without getting into any  
17 constitutional question.

18                   Third, on the -- the balance of the  
19 equities, I want to make sure the Court is aware of  
20 Secretary Nielsen's rescission memo, which addresses the  
21 reliance interests of DACA recipients. And if you don't  
22 mind, I'd like to put that up on the ELMO.

23                   This is in the last paragraph of her  
24 supplemental rescission memo in which she explains in the  
25 highlighted portion, "The DACA policy was announced as a

1 temporary stopgap measure, not a permanent fix. It was  
2 expressly limited to two-year renewal periods. It  
3 expressly conferred no substantive rights and was revocal  
4 [sic]" -- "revocable as any time. In my judgment, neither  
5 any individual's reliance on the expected continuation of  
6 the DACA policy nor the sympathetic circumstances of DACA  
7 recipients as a class overcomes the legal and institutional  
8 concerns with sanctioning the continued presence of  
9 hundreds of thousands of aliens who are illegally present,  
10 in violation of the law as passed by the Congress, a status  
11 that the DACA nonenforcement policy did not change. And in  
12 all events, the rescission of the DACA policy does not  
13 preclude the exercise of deferred action in individual  
14 cases if circumstances warrant."

15 I just want to -- wanted to point that to  
16 the Court's attention for consideration when balancing the  
17 equities here. And then the fourth point just on the  
18 nationwide scope of relief, the Department of Justice has  
19 been consistent that any relief that a court awards should  
20 be limited in scope to redress the injury to the plaintiffs  
21 in the particular case.

22 We understand the Fifth Circuit upheld the  
23 Court's prior nationwide injunction, don't intend to  
24 relitigate that question here, but we do just want to  
25 emphasize that our view is that injunction should be

1 limited to the plaintiffs -- plaintiffs in the particular  
2 case that have demonstrated standing, that are injured, and  
3 the injunction should be limited to remedying that  
4 plaintiff's injury.

12:12:54

5 THE COURT: So how would I enforce that?

12:13:07

6 MR. SHUMATE: I understand it's difficult in  
7 this case because of the reasons that Texas has identified;  
8 but, for example, if there's a -- there simply is no reason  
9 to extend an injunction to the State of Maine. It's hard  
10 to imagine how Texas would be injured by the presence of a  
11 DACA recipient in the State of Maine. I understand there  
12 are complications when there's a right to travel; but  
13 still, the Court should limit any injunctive relief that it  
14 desires to award here to the -- to Texas itself.

12:13:24

15 THE COURT: All right. Thank you, sir.

12:13:49

16 MS. PERALES: I would like to start with  
17 Prong 1, irreparable harm, and I'd like to start -- because  
18 our sense of the timing of this goes under the category of  
19 irreparable harm, Your Honor, so I will address the timing  
20 of the filing of this case.

21 THE COURT: It's really Prong 2, but that's all  
22 right.

23 MS. PERALES: I'm so sorry. I'd like to start  
24 with irreparable harm, if I might.

12:13:58

25 THE COURT: Go ahead.

1 MS. PERALES: DACA was first implemented in  
2 2012. Plaintiffs did not challenge it. And in 2012 and  
3 2013, as the Court will see from some of the exhibits in  
4 the case, was really when the largest number of young  
5 people stepped forward to -- to apply and see if they could  
6 receive a favorable exercise or discretion in DACA.

7 In 2014, when most of the current group  
8 were already DACA recipients and leading their lives and  
9 going to school, the plaintiffs did file suit, but they  
10 specifically chose not to challenge DACA. Plaintiffs filed  
11 suit against DAPA and expanded DACA but made clear, as we  
12 all know from being there, that they were not challenging  
13 2012 DACA.

14 In 2016, after the Supreme Court decision,  
15 plaintiffs chose, in the DAPA case, not to amend their  
16 complaint, to secure a court order or a settlement that  
17 would wind down or rescind DACA. And then later in 2016,  
18 plaintiffs chose to dismiss their lawsuit after other  
19 lawsuits had already been filed, specifically the  
20 California case, challenging the rescission.

21 I received a very fine piece of advice  
22 once from Judge Patrick Higginbotham, who told me, If you  
23 want something, you need to put it on a string. And if  
24 Texas felt strongly, and the other states, that they were  
25 being injured by DACA, they certainly could have sued in

1 2012, they could have sued in 2013, they could have sued in  
2 2014, and they could have sued in 2015. And even when the  
3 DAPA case was on appeal, plaintiffs were not restrained in  
4 any way from filing a lawsuit against DACA if they felt  
5 that they were injured and that that was necessary. And  
6 even at the very tail end of the DAPA litigation, when they  
7 had the option to amend the complaint and get a court  
8 order, something binding, they did not do so.

12:16:07

9 Texas describes this as prudence, and  
10 perhaps it was prudent if one was seeking to litigate a  
11 policy dispute about DACA, but it certainly doesn't line up  
12 with any claim of injury, real injury, or the threat of  
13 irreparable harm.

12:16:27

14 I'd like to note that with respect to the  
15 actual irreparable harm, this really meets nothing other  
16 than the definition of "speculation." All we have in this  
17 case is one number, 115,000 young individuals in Texas who  
18 are currently DACA recipients, less than one percent of the  
19 Texas population.

12:16:46

20 From that number, 115,000, we have to take  
21 a series of imaginary leaps. We have to imagine that Texas  
22 spends money on these particular individuals in education,  
23 health, and law enforcement, and then we have to imagine  
24 that these -- some group of these people would leave  
25 because they're receiving these services and then would

12:17:07

12:17:30

1 choose to leave the country if they no longer had these  
2 services.

3                   We have to make imaginary leaps that  
4 employers in Texas hire DACA recipients over U.S. citizens  
12:17:44 5 because they're DACA recipients and there's some peculiar  
6 interaction under the Affordable Care Act. And then we  
7 have to further imagine that somehow these DACA recipients  
8 would -- would leave the country again if they lost their  
9 employment.

12:18:04 10                   If anything, common sense suggests that if  
11 there were DACA recipients in Texas who lost their DACA,  
12 lost their work authorization, and lost their jobs, if  
13 anything, there would be a greater reliance on safety-net  
14 programs because people would lose their ability to support  
12:18:26 15 themselves.

16                   I would like to go now to the merits, Your  
17 Honor, and touch on four things, but really three things,  
18 and the first is reviewability. I'd like to start with the  
19 federal defendants' position in Washington, D.C. The  
12:18:45 20 federal defendants filed a brief last month, on July 11,  
21 2018, in the D.C. litigation -- and that's at Docket 74 --  
22 in which they incorporate by reference their motion to  
23 dismiss at Page 18. And so their motion to dismiss was  
24 Docket 8 in the D.C. case.

12:19:06 25                   They have an entire section there

1 beginning, "This case is not justiciable," and it makes an  
2 entire argument about the lack of justiciability, the lack  
3 of reviewability of decisions related to  
4 immigration-enforcement policy because those decisions are  
5 matters committed to agency discretion by law.

12:19:26

6 The United States argues that the INA  
7 deprives district courts of jurisdiction over challenges to  
8 denial of deferred action and that nonindividual  
9 plaintiffs' claims are not cognizable.

12:19:44

10 So we simply want to point to those  
11 arguments, Your Honor, because they do go to reviewability.  
12 They are not being made here, but they were made by the  
13 United States just last month in a different forum.

12:19:59

14 THE COURT: Of course, they lost those  
15 arguments.

16 MS. PERALES: And yet they made them, and they  
17 were -- they are arguments that are similar to the  
18 arguments that we make, as well.

12:20:11

19 I'm not going to rehash things that are in  
20 our brief, Your Honor, because your time --

21 THE COURT: Thank you.

22 MS. PERALES: -- your time is precious, Your  
23 Honor, but I did want to touch very lightly on two  
24 additional things related to reviewability, is that the

12:20:22

25 Fifth Circuit moved through its reviewability analysis, and

1 we believe that there is more information now for the Court  
2 to consider that does come from *Trump vs. Hawaii*,  
3 specifically with respect to reviewability. And just to  
4 point out, Your Honor, that the Supreme Court in *Trump vs.*  
5 *Hawaii*, when it's looking at exercise of discretion and  
6 whether that's reviewable, rejects two suggestions from  
7 dissenters: One, that there needs to be a case-by-case  
8 adjudication of individual requests in order for this  
9 discretionary act to be nonreviewable; and then the other  
10 suggestion from the dissent is that approval rates somehow  
11 bear on reviewability.

12                   And the majority says when something is  
13 committed to agency discretion, you're not going to be  
14 looking at case-by-case education or reviewal rates with  
15 respect to the question of reviewability. And so we  
16 believe that there's a little more to add on that point  
17 beyond what the Fifth Circuit did in the DAPA case when it  
18 found --

19                   THE COURT: Connect the dots for me, though.  
20 How does that help me or hurt -- hurt them in this case?

21                   MS. PERALES: Well, to the extent that the  
22 Fifth Circuit in DAPA found DAPA reviewable by looking at  
23 approval rates or by looking at whether there was  
24 case-by-case adjudication --

25                   THE COURT: Based on my fact-finding?



1 MS. PERALES: At that time, yes.

2 THE COURT: So we're talking about the  
3 procedural APA violation?

4 MS. PERALES: No. Actually, the predecessor  
12:22:03 5 question of just reviewability before we get to -- to the  
6 procedural APA claim. Just this question of whether this  
7 is something that ought to be looked at at all by a court,  
8 there is, we believe, more to inform, that the Fifth  
9 Circuit was looking at some subjects that perhaps under  
12:22:20 10 *Trump vs. Hawaii*, the Supreme Court is saying, You know  
11 what, for the question of reviewability, we shouldn't be  
12 looking deep inside how it's being executed but whether or  
13 not the agency has been given this discretion in the first  
14 place. So that -- that's just a small point, Your Honor,  
12:22:34 15 that we wanted to highlight for you, and it's expanded on  
16 in the brief.

17 And then, finally, also that DAPA does, in  
18 the -- in the section on reviewability, talk about the size  
19 of the group that's getting relief; and I'll talk about  
12:22:49 20 that again, but simply that the Fifth Circuit did note that  
21 the very, very large size of DAPA mattered to them when  
22 they were thinking about this question of reviewability.

23 THE COURT: How does it matter legally?

24 MS. PERALES: Well, I can see that the Fifth  
12:23:06 25 Circuit --

1 THE COURT: Well, I can see why they said it.  
2 Obviously 4.5 and 1.5 are two -- you know, one is three  
3 times bigger; but if they were both implemented and created  
4 in the same fashion, they both award the same benefits,  
12:23:27 5 they both award legal presence and deferred action -- or  
6 it's a granting of deferred action, I mean, how does the  
7 number really matter?

8 MS. PERALES: I have an analogy for Your Honor  
9 on this.

10 THE COURT: Good.

11 MS. PERALES: We know from the DAPA case that  
12 the Fifth Circuit looked at the size of DAPA, at the 4.5  
13 million potential beneficiaries, and saw that as basically  
14 a third of the estimated number of undocumented people in  
12:23:58 15 the United States and linked those two things together,  
16 setting aside a third of the undocumented population of the  
17 United States to -- to the Fifth Circuit, ultimately, where  
18 they discuss the size the most is on whether it exceeds  
19 authority under the INA to discretionarily relieve some  
12:24:15 20 people of removal.

21 So we have that on the far end, that the  
22 Fifth Circuit said that DAPA and its scale and its size  
23 suggested that it was beyond Executive authority.

24 At the other end of the spectrum, Your  
12:24:30 25 Honor, we have the everyday decisions, the everyday grants

1 of deferred action that are made by USCIS district  
2 directors here in Houston, down in San Antonio, where my  
3 office is. We have individual day-to-day grants by ICE in  
4 field offices to do deferred action.

12:24:50

5 Your Honor is familiar with when  
6 individuals who are undocumented are cooperating with law  
7 enforcement, they are granted deferred action for the  
8 period in which they are cooperating, and work  
9 authorization and those things that flow from deferred

12:25:04

10 action. And -- and Texas and the other plaintiffs don't  
11 appear to challenge that. And so we have a spectrum  
12 where --

12:25:17

13 And also, may I -- may I place on the  
14 spectrum, as well, there are groups of people beyond  
15 law-enforcement cooperators, who routinely get deferred  
16 action from the USCIS. There are beneficiaries of  
17 family-preference petitions who are at the tail end of  
18 their adjudication process. There are many others that are  
19 not referenced in the INA.

12:25:30

20 THE COURT: So we have those that wanted --  
21 wanted a shot. So we have one over here, and we have 4.5  
22 over here.

12:25:43

23 MS. PERALES: We do. And so the Court's task,  
24 really, and why numbers perhaps matter, is the Court's  
25 task, understanding that the Fifth Circuit has said that

1 the size mattered in their decision in DAPA, and the fact  
2 that nobody is challenging the ones and the twos or perhaps  
3 the several thousand law-enforcement cooperators or perhaps  
4 the tens of thousands of people who are the beneficiaries  
5 of family-preference petitions and other deferred-action  
6 beneficiaries who are not mentioned in the statute, right?  
7 So the statute talks -- the INA talks more broadly about  
8 deferred action as being discretionary, right?

9                               And so the Court's job is to locate DACA  
10 in here somewhere. And for that reason, size does matter,  
11 because DACA is much, much smaller than DAPA ever was.  
12 It's only about five percent of the undocumented population  
13 in the U.S. The current number of DACA recipients is  
14 702,000 as of May 31st.

15                           THE COURT: Well, but the total population  
16 could be as much as 1.9, according to one of your exhibits.

17                           MS. PERALES: Perhaps when it was first  
18 announced, Your Honor, but today we know that most people  
19 who were eligible for DACA -- those who have come forward  
20 have come forward. We have a small group that's aging in  
21 who are children, and then we may have some group of people  
22 that have never applied but who could potentially apply at  
23 this point, but we know most have come forward. So we  
24 would offer to the Court that the 702,000, which is the  
25 number we have today, is -- is really an important number

1 to look at.

2 THE COURT: Okay. Because that's not what your  
3 exhibits say. Your exhibits say on the low end, 1.3, and  
4 1.9. So I was kind of saying 1.5 is kind of a midpoint,  
5 even though 1.6 would be the technical midpoint of those  
6 two figures, but -- so you're saying it's half that much?

7 MS. PERALES: Well, the estimate when DACA was  
8 first promulgated was that potentially eligible people  
9 would be about 1.5 million. That was back in 2012 when it  
10 was first promulgated. Similar to with Family Fairness,  
11 when Family Fairness in Bush 1 was first promulgated, it  
12 would potentially affect up to 1.5 million people. 1.5  
13 million people didn't end up getting --

14 THE COURT: Well, Dr. Perryman uses 1.3, and  
15 that's -- he prepared that for this lawsuit.

16 MS. PERALES: All I can tell you, Your Honor,  
17 is that the exhibits show from USCIS that the current  
18 number of people who receive DACA as of May 31st, 2018 is  
19 702,000, and then that is the group that we're working with  
20 in terms of the -- the folks who are eligible for their  
21 renewal. And -- and so --

22 THE COURT: I thought there was something that  
23 said that 2018 numbers were, like, in the low 8s, like 813,  
24 eight-something.

25 MS. PERALES: That's the total number of people

1 who've ever had a DACA application approved.

2 THE COURT: So they didn't renew?

3 MS. PERALES: Yes.

4 THE COURT: There's a population --

12:28:35 5 MS. PERALES: That's exactly right, Your Honor.  
6 There's a little over 100,000 people who did not renew, so  
7 we are working with our 702,000 number. And then that's  
8 the number that the Court is going to place on the spectrum  
9 when it's thinking about whether or not the agency has  
12:28:48 10 exceeded its authority.

11 And so moving to the procedural claim,  
12 Your Honor, a lot of what the Fifth Circuit talked about in  
13 the DAPA case turned on its affirmative -- this court's  
14 fact-findings related to whether or not DACA was truly  
12:29:06 15 discretionary, because if DACA is truly discretionary, it  
16 is -- as we've asserted, it's the policy statement. It's  
17 the rule of agency organization, procedure, or practice.

18 Here we have, although not a fully  
19 developed record, we have a much better developed record on  
12:29:22 20 the question of rubber-stamping. We've had the opportunity  
21 to depose Mr. Palinkas in New York, and -- and he was -- he  
22 was very forthright in explaining that he didn't have any  
23 firsthand knowledge of how DACA was adjudicated and that  
24 he -- he really based his ideas of a rubber stamp more on  
12:29:42 25 some of the numbers that he had been reviewing and his

1 personal objection to adjudication being done at what are  
2 known as USCIS Service Centers, and there are five of them  
3 around the country.

12:29:58

4                   Service centers adjudicate approximately  
5 two million different types of USCIS benefits applications  
6 every year, and -- and this is the way the agency conducts  
7 a good portion of its adjudication. And those are  
8 employment-based visas; those are deferred action; those  
9 are VAWA; those are Us; those are Ts. Lots and lots of  
10 things are adjudicated at service centers. And -- and I  
11 don't think that there's any assertion here in this case  
12 that adjudicating something at a service center somehow  
13 makes it vulnerable to a procedural APA claim.

12:30:17

14                   We also have now have the testimony of  
15 Mr. Knowles, who is the current USCIS union president, who  
16 took some steps to call union leaders at the two service  
17 centers where DACA is currently adjudicated. That's in  
18 California and Nebraska. And he was able to share the  
19 information that he learned from union leaders that they do  
20 not rubber-stamp; in fact, that they were surprised to hear  
21 that suggestion, because as one USCIS DACA adjudicator put  
22 it, it's -- that DACA is the most discretionary application  
23 that he's ever had to adjudicate among the various form  
24 types that he is trained on.

12:30:48

12:31:08

25                   And so I would like to move to substantive

1 APA now, knowing that there's a great deal more in our  
2 briefs, Your Honor, on these points. And we have just  
3 three points that we wanted to emphasize here.

4 And I think the Court mentioned it a  
12:31:22 5 little bit earlier, but the Fifth Circuit's substantive APA  
6 considerations turned, in part, on concluding that the INA  
7 had already set out a process for the parents of U.S.  
8 citizen children to gain status; and, you know, the child  
9 has to turn 21, and all of these other things have to be in  
12:31:44 10 place, and that that was a reason that the Fifth Circuit  
11 cited as thinking that it was less likely that Congress  
12 intended for discretion to be exercised in this area, with  
13 a broader grant of deferred action. We don't have that  
14 here. DACA is different from DAPA with that respect.

12:32:02 15 The -- the question of size, I've already  
16 covered with Your Honor. And -- and the Fifth Circuit not  
17 only talked about size in terms of just the sheer number of  
18 people, up to one-third of the -- of the undocumented  
19 population; but also talked about it with respect to work  
12:32:23 20 authorization, saying that work authorizing that many  
21 people could have an effect that Congress didn't intend  
22 when it enacted IRCA. And here again, the size matters  
23 with respect to work authorization, as well as being not  
24 placed into removal proceedings.

12:32:40 25 THE COURT: What do you do with the argument



1 that was made in the last case that was never fully  
2 answered? Because I asked the question; Fifth Circuit  
3 asked the question; the Chief Justice asked the question,  
4 that under this theory, the Executive Branch could admit  
5 every illegal alien in the country and give them legal  
6 presence. And -- and basically, they conceded that's  
7 right, we could --

8 MS. PERALES: We would not agree.

9 THE COURT: -- but wouldn't is what they told  
10 the Supreme Court.

11 MS. PERALES: And the Fifth Circuit says that  
12 that's just -- that's just beyond what the agency is -- is  
13 authorized to do by Congress.

14 Now, that's different than saying that the  
15 agency couldn't take any one particular individual and  
16 decide that for whatever reason, the agency would give that  
17 person deferred action. Maybe one person, any particular  
18 person, but not everybody, Your Honor, because that  
19 would -- you know, Congress gives the agency funds  
20 sufficient to prosecute and remove about 450,000 people a  
21 year. As far as we know the agency is definitely doing  
22 that. The agency is putting lots of people into removal.  
23 We are -- we are not in that place where we're talking  
24 about the authority, and we wouldn't -- we wouldn't  
25 posit --

1 THE COURT: Let me bring up -- you bring up  
2 Congress. Let's talk about that for a minute.

3 In the DAPA litigation, one of the  
4 arguments to find it legal was that Congress hadn't spoken  
12:34:21 5 in this area. In this area, the DACA, it's considered  
6 legislation approving this vari- -- variations of this same  
7 population ten times, and it's been rejected ten times. So  
8 it has spoken, hasn't it?

9 MS. PERALES: No, Your Honor, because this is  
12:34:40 10 why. And just to go back to deferred action itself,  
11 Congress leaves space for the Executive to make grants of  
12 deferred action, even to groups of people. And in many --  
13 in a number of occasions in the past, Congress has been  
14 working on legislation at the same time that the agency was  
12:35:01 15 shifting groups of people. So the 1.5 million potentially  
16 eligible folks under Family Unity, which then later became  
17 a statute, became Family Fairness. And then there were  
18 also modifications of the statutes with respect to U- and  
19 T-visas and VAWA.

12:35:16 20 THE COURT: So the Fifth Circuit  
21 interstitial-to-pending-litigation language, it doesn't  
22 matter whether the legislation got passed or whether it got  
23 rejected? Because it just got rejected.

24 MS. PERALES: Well, the -- the Fifth Circuit  
12:35:27 25 was talking about interstitial-to-enacted legislation, so

1 my understanding of that decision is that Congress speaks  
2 when it enacts legislation.

3 THE COURT: It also speaks when it considers  
4 litigation -- legislation and turns it down.

12:35:41

5 MS. PERALES: Ah, but --

6 THE COURT: It -- it says, We don't want this,  
7 doesn't it? I mean, isn't that the effect of it?

8 MS. PERALES: Right up until they do pass  
9 something, Your Honor, and then it is considered --

12:35:50

10 considered interstitial. I mean, the Fifth Circuit  
11 remarked that certain deferred-action initiatives were  
12 interstitial, but at the time, they weren't interstitial  
13 because Congress hadn't caught up with those  
14 deferred-action initiatives.

12:36:01

15 So what was interesting about the Fifth  
16 Circuit --

17 THE COURT: How does Congress send a message  
18 that it doesn't like something if it -- if it's not through  
19 turning down legislation? Because it's -- in this case,  
20 it's turned it down ten -- I mean, I'm looking since 2003.  
21 It's turned it down ten times, including twice in 2009,  
22 when it -- when it was controlled by the same party.

12:36:12

23 MS. PERALES: It's also important, Your  
24 Honor --

12:36:25

25 THE COURT: When both houses were controlled by

1 the same party.

2 MS. PERALES: It's also important, Your Honor,  
3 to note that Congress has also tolerated deferred action  
4 before and then subsequently adopted it or let it continue  
5 and that during this entire period that Congress has been  
6 thinking about what to do, the legislative solution to  
7 DREAMers, Congress has also known that deferred action has  
8 been in place through DACA. And this is just as a  
9 theoretical matter. Congress has not acted to end any of  
10 that, as well.

11 So what we have is a situation, for what  
12 it's worth, of toleration of the status quo, toleration of  
13 DACA, no legislative moves to -- to take or limit deferred  
14 action so that it could not be granted through DACA, and a  
15 continuation to work on this issue.

16 I know that we've sort of --

17 THE COURT: So if it passes, Congress is in  
18 favor of it; and if it's rejected, Congress is in favor of  
19 it?

20 MS. PERALES: No. Well, no, Your Honor, I  
21 wouldn't say that. I -- I'm loathe to apply legislative  
22 intent to efforts to pass legislation that are not  
23 successful. I guess, that's -- I can't be more helpful  
24 than that. I'm sorry, Your Honor.

25 THE COURT: Okay.

1 MS. PERALES: I would like to say that with  
2 respect to those things that come with deferred action, I  
3 just want to make a distinction that is there in our brief  
4 but which I feel is important.

12:37:51

5 Deferred action comes with a reprieve from  
6 removal proceedings. It comes with work authorization, and  
7 it has since the Bush era, and those are ensconced in  
8 regulation; and with work authorization, the ability to  
9 contribute to the Social Security system and receive

12:38:09

10 retirement at the end of the line; and then finally, also  
11 something which is not immigration status but which is  
12 known as lawful presence, which can be revoked upon the  
13 issuance of an NTA or at any moment's notice. There are no  
14 due-process pieces attached to that lawful presence, but

12:38:29

15 because of the way that Congress has written REAL ID and  
16 recognized deferred action, we do have the ability in some  
17 states to get driver's licenses. And I want to acknowledge  
18 that because I want to move to what deferred action does  
19 not do, because the plaintiffs set out a whole series of

12:38:46

20 additional things that they claim that deferred action does  
21 that is in direct contradiction to the INA, which it simply  
22 does not. And -- and there is quite a bit of confusion  
23 about what the INA provides and doesn't provide, and I  
24 apologize in advance for sort of the dueling briefs on

12:39:03

25 this, but I just want to cover.

1 Deferred action is not a defense to  
2 removal under the INA. Deferred action does not vitiate  
3 the -- what are called informally the reentry bars under  
4 the INA. Deferred action does not provide a grounds for  
12:39:16 5 adjustment of status. To the extent that the plaintiffs  
6 say Family Unity was not accompanied by work authorization,  
7 that is correct. Deferred action does not entitle  
8 recipients to social welfare benefits that were restricted  
9 by Congress in 1996 in PRWORA.

12:39:33 10 And then finally, with -- with respect to  
11 advance parole, you'll see a sort of shifting position on  
12 the part of plaintiffs as perhaps more light was shed on  
13 advance parole. Plaintiffs began by suggesting tens of  
14 thousands of people who have DACA and no other way to  
12:39:47 15 address status have somehow taken advantage of advance  
16 parole. We know today that there are less than 5,000 DACA  
17 recipients who have ever taken advance parole and  
18 subsequently applied to adjust their status. Many have  
19 already made a lawful entry because they were visa  
12:40:06 20 overstay or otherwise made lawful entries, and so we're  
21 talking about --

22 THE COURT: But DACA does let them have advance  
23 parole. The handbook gives them that right.

24 MS. PERALES: Yes, it does, and that's already  
12:40:17 25 ensconced in statute. It's the effect of advance parole or

1 the role that advance parole plays that -- that we wanted  
2 to shed light on for the Court. It's a tiny, tiny number  
3 of individual DACA recipients who have taken advance parole  
4 and subsequently applied to adjust status. And among that  
5 tiny, tiny number, there are still people who never needed  
6 to take advance parole but they did so to -- for  
7 humanitarian reasons or other reasons.

8                   And so Texas, we've been winnowing this  
9 down over the course of the briefs, but just to leave it at  
10 a very, very tiny number. And I just want to speak on  
11 behalf of two of the clients that Texas said have used  
12 advance parole to adjust their status. That is not  
13 correct. Neither of them have done so, and neither of them  
14 need to.

15                   This tangle of errors in explaining  
16 immigration law, Your Honor, by itself provides grounds for  
17 denying a preliminary injunction until a lot of this can be  
18 sorted out and clarified. In the meantime, we really are  
19 just talking about deferred action, work authorization, and  
20 what is known as lawful presence. That is not immigration  
21 status.

22                   With respect to the Take Care Clause, Your  
23 Honor, we do believe that the arguments that the plaintiffs  
24 have are really subsidiary to the substantive APA.

25                   And then, finally, with respect to the

1 balance of the equities and the public interest, as my  
2 friend from New Jersey has pointed out, the status quo now  
3 is almost the exact opposite of what we were dealing with  
4 in DAPA. In DAPA, we had something that had not commenced,  
5 that was not underway. Here, we have, at the moment,  
6 702,000 young individuals in the country who are getting up  
7 every morning, they are going to school, they are going to  
8 work. There is no great harm or any identifiable injury  
9 from their continued presence in doing what they're doing,  
10 and for that reason the balance of the equities in the  
11 public interest tip heavily towards maintaining the status  
12 quo at least until the Court can develop the record better  
13 and come to a merits decision.

14                   You know, in DAPA, there was frequently --  
15 and particularly the Fifth Circuit noted there was a very  
16 large impending change that was going to be very hard to  
17 reverse. Here, the effects have already been felt.  
18 Plaintiffs cannot quantify them. And we don't have the  
19 situation of the inability to restore -- to restore the  
20 status quo ante.

21                   Thank you.

22                   THE COURT: Thank you, Ms. Perales.

23                   Ms. Apter?

24                   MS. WAINER APTER: Thank you, Your Honor. Just  
25 a few points that Ms. Perales did not cover.



1 First, when it comes to irreparable harm,  
2 as Your Honor pointed out, there was a very long delay  
3 here, obviously, of six years. What plaintiffs don't  
4 mention is that when they filed suit to enjoin the Johnson  
5 memo in the fall of 2014, at the time, in addition to  
6 specifically declining to challenge DACA, they actually  
7 claimed that DACA, and I quote, "had and continues to have  
8 dire consequences in the Plaintiff States." And that's at  
9 App. 55 and 67 of the original index filed by Texas.

10 And so I think that just makes clear that  
11 plaintiffs here made an affirmative choice to sit on the  
12 sidelines for six years while 689,800 -- and just to be  
13 clear, I'm using the number as of September 2017, which is  
14 why it's not --

15 THE COURT: We have all kinds of numbers.

16 MS. WAINER APTER: I know, which is why it's  
17 not the exact same number used by Ms. Perales, so I  
18 apologize.

19 So while people came forward, disclosed  
20 their presence to the Federal Government, turned over  
21 private information, submitted to biometrics, and then  
22 relied on deferred action to plan their careers, obtain  
23 advanced degrees, buy homes, and create full lives out in  
24 the open in the United States, that alone should be enough  
25 to show this Court that plaintiffs are not going to be

1 irreparably harmed, and their motion for a preliminary  
2 injunction should be rejected on that basis.

3 THE COURT: Well, let me ask you this,  
4 Ms. Apter, and maybe I should have asked Ms. Perales.

12:44:48

5 If -- if -- and I can't remember which  
6 brief it was, but one of the briefs filed by the plaintiffs  
7 says something to the effect of, Look, they knew the status  
8 was revokable the minute they got it. Why do they have any  
9 right to rely on it?

12:45:10

10 MS. WAINER APTER: So, Your Honor --

11 THE COURT: I'm paraphrasing that, but  
12 that's -- that's, in essence, what they asked.

13 MS. WAINER APTER: Understood. So the  
14 Executive always has the ability to reverse course on

12:45:19

15 policies; however, that does not mean --

16 THE COURT: I keep looking over at this table.  
17 They're just laughing. Their ability to reverse course has  
18 not been smooth.

19 (Laughter.)

12:45:31

20 MS. WAINER APTER: So in theory, the Executive  
21 always has the ability to reverse course on any policy, but  
22 that does not mean that a policy that is reversible cannot  
23 engender reliance interests, and so that's the *Encino Motor*  
24 *Cars* decision from the Supreme Court from a few years ago,

12:45:45

25 which says even when an Executive policy can be reversed,

1 you need to take into consideration reliance interests.

2 And so I think especially when it comes to  
3 this Court, when you're trying to balance the equities, I  
4 don't think there is any legitimate ground to say you have  
5 to close your eyes to the fact that there are 689,800  
6 people who came forward, who gave their information to DHS,  
7 and that this Court has to ignore that.

8 Actually, last time around in the DAPA  
9 litigation, this Court recognized that for people who did  
10 accept DHS's invitation to come out of the shadows, there  
11 may be, and I quote, "dire consequences for them if DAPA is  
12 later found to be illegal or unconstitutional."

13 The DHS, whether -- whether under this  
14 administration or the next, will then have all pertinent  
15 identifying information for these immigrants and could  
16 deport them. And so Your Honor recognized last time around  
17 that that is a concern and one that this Court has to weigh  
18 when it comes to balancing of the equities.

19 THE COURT: Let me ask you one other question,  
20 which kind of tails in, you know, I asked Ms. Perales  
21 about. What do I do with the fact that Congress has  
22 rejected every iteration of DACA? What do I do with the  
23 fact -- for instance, New Jersey has intervened. I've got  
24 amicus briefs from any number of states that -- that come  
25 in basically saying the same thing, the position that New

1 Jersey is taking here. In 2018, New Jersey voted against  
2 the DREAM Kids Act. Congressional 7 to 5 is the way it's  
3 split. And if you take all of my amicus briefs that are  
4 saying, We want DACA, we want DACA, and take their votes  
5 that were against DACA and put it on, it would have passed  
6 2 to 1.

7 MS. WAINER APTER: So two points there, Your  
8 Honor. One, DACA is not a DREAM Act, so all of the pieces  
9 of legislation --

10 THE COURT: Well, all of them have different --  
11 they're -- they're all different. They define the  
12 population differently. There's all kinds of -- that's why  
13 I said "iterations." They're not all the same act,  
14 obviously.

15 MS. WAINER APTER: Understood. But I believe  
16 that most of the ones, if not all of the ones, that have  
17 been voted on have provided a path to citizenship. And so  
18 it's usually some sort of conditional form of LPR status  
19 for a certain number of years, and then the condition can  
20 be removed, and then the DACA grantee, who is not a DACA  
21 grantee -- the DREAMer -- I'm sorry -- can then become a  
22 citizen.

23 And so DACA is different because it's only  
24 providing a renewable two years of deferred action. It  
25 does not say that at the end of the two years, you can

1 apply to adjust to LPR status; or at the end of the two  
2 years, you can have the conditional nature of your deferred  
3 action removed and then you can become a citizen. And so  
4 at the end of the day, the legislation is different than  
5 the deferred action here. And I want to make one more  
6 point related to that.

12:48:32

7 So the Family Fairness that you were  
8 talking about with Ms. Perales, at the time Congress kept  
9 rejecting that also. And so Family Fairness, the policy  
10 originally was from 1987. At the time, Congress had  
11 specifically said, We do not envision that the spouses and  
12 unauthorized children of anyone who is legalizing will get  
13 any kind of benefit. They will have to wait in line. So  
14 Congress specifically said, We are not providing for the  
15 unauthorized spouses or children in this law.

12:48:46

12:49:05

16 THE COURT: How did they say that?

17 MS. WAINER APTER: It was in a Senate report  
18 that they would have to wait in line, but Congress had also  
19 considered many bills. So just as Your Honor pointed out  
20 that Congress here has considered the DREAM Act, there were  
21 many bills between 1987 and 1990 that would have covered  
22 the same population of unauthorized children and spouses,  
23 and Congress rejected each one until eventually they passed  
24 one, and that was in November of 1990. And when they did  
25 that, I think it's very interesting, Your Honor, to note

12:49:17

12:49:36

1 that they didn't pass it and say, And we are very angry  
2 that the Executive implemented this discretionary policy in  
3 the interim.

4                   Instead, they said, Our law is not going  
12:49:53 5 to go into effect for another one year. So this was in  
6 November of 1990. They said, Our law is not going to go  
7 into effect until November of 1991. In the interim, the  
8 Executive's discretionary policy remains what covers these  
9 people, and so they actually approved.

12:50:09 10               THE COURT: Isn't there some act here that says  
11 that about DACA? Do I have a -- has Congress spoken in  
12 saying, Go ahead and do it, because we're going to pass it  
13 next year?

14               MS. WAINER APTER: No, Your Honor, but at the  
12:50:18 15 time, for example, in early 1990, there was no indication  
16 that Congress actually would pass it either, because they  
17 had rejected it numerous times. And so that's something  
18 that, you know, we have to end up just waiting and seeing  
19 what Congress does.

12:50:30 20               THE COURT: So it would be -- any size group  
21 would be legal as long as we think -- and I don't know  
22 who -- who gets to make that decision, maybe me -- that we  
23 think sometime in the future, Congress may pass something?

24               MS. WAINER APTER: No, Your Honor, I don't  
12:50:44 25 think so. I think that there are three limits that come

1 from the Fifth Circuit's opinion about what can be  
2 accomplished through deferred action. The first one is it  
3 cannot contradict Congress's priorities. So, for example,  
4 Congress has stated that it prioritizes the removal of  
5 criminal aliens, it prioritizes the removal of aliens who  
6 just crossed the border illegally.

7                   The Executive could not attempt a  
8 deferred-action policy that applied to criminal aliens or  
9 those who just crossed the border illegally, so that is  
10 one --

11                   THE COURT: Well, it also has a policy of  
12 employing U.S. citizens and not people who came into the  
13 country illegally. It does contradict that.

14                   MS. WAINER APTER: Well, Your Honor, the  
15 definition, actually, of an unauthorized worker in the INA  
16 is one who is not permitted to work either by statute or by  
17 the Attorney General. And the authority of the Attorney  
18 General to grant work authorization have subsequently been  
19 transferred to the Secretary of DHS, and the INS actually  
20 adjudicated a claim in 1987 that said -- actually DHS, back  
21 then the INS, doesn't have any authority to grant work  
22 authorization unless Congress has already done so. And the  
23 INS said, No. The statute intentionally uses the word  
24 "or," which means that the statute recognizes someone is  
25 only authorized to work when either the statute says so or

1 when the Attorney General has granted them permission.

2 THE COURT: So the Attorney General could grant  
3 11.5 or 11.12 or 13, however -- whatever the current figure  
4 is, for the number of illegal aliens? They could do it for  
5 the whole population? That -- that was the same question  
6 the Supreme Court asked and no one could answer.

7 MS. WAINER APTER: No. So going back to my  
8 three proposed limits -- so I'm trying to answer -- one of  
9 the limits was cannot grant it to anyone in violation of  
10 Congress's priority. So, for example, can't grant it to  
11 any criminal alien, can't grant it to anyone who just  
12 crossed the border illegally.

13 Number 2, cannot --

14 THE COURT: Well, a lot of the -- a lot of the  
15 11.3 million people -- I'm using that Pew study for that  
16 figure -- they've been in the country for years.

17 MS. WAINER APTER: Correct. And so they  
18 wouldn't be addressed by that one.

19 THE COURT: They might be DAPA except for the  
20 age -- they might be eligible for DACA except for their  
21 age.

22 MS. WAINER APTER: But I think there are two  
23 other important limitations that can be taken from the  
24 Fifth Circuit's opinion. The second one is, Cannot address  
25 a population that Congress has already explicitly provided



1 for. And so this goes back to the core of the Fifth  
2 Circuit substantive APA holding was that at *Chevron* step  
3 one, Congress had already direct -- and I quote, "directly  
4 addressed the precise question at issue: how parents may  
12:53:23 5 derive an immigration classification on the basis of their  
6 child's status." And the Fifth Circuit actually goes  
7 through at length and explains that, according to Congress,  
8 there's an intricate process for illegal aliens to derive a  
9 lawful immigration classification from their child's  
10 immigration status, and that involves having a U.S. child  
11 who's at least 21 years old, leaving the U.S., waiting ten  
12 years, and then obtaining one of the limited number of  
13 Family Preference visas from a U.S. consulate.

14 THE COURT: Should I give *Chevron* deference in  
12:53:52 15 this case?

16 MS. WAINER APTER: Your Honor, we think  
17 that you should give *Chevron* defer- -- deference to the  
18 original DACA memo, but we think it doesn't actually  
19 matter, because we think even --

12:54:03 20 THE COURT: Wait, wait. Back up. If I give  
21 deference to the interpretation of the agency, the agency  
22 wants to rescind it now.

23 MS. WAINER APTER: Correct, but that has been  
24 set forth in a very informal way. And we think even  
12:54:14 25 without *Chevron* deference, the question here would be the

1 same. So the question is not whether Congress has ever  
2 specifically enacted the Napolitano memo into the INA.

3                   Instead, the question is whether anything  
4 in the INA, which charges secretary with establishing  
12:54:30 5 national immigration priorities, establishing such  
6 regulations, and performing such other acts as he deems  
7 necessary and enforcing the immigration laws, whether --  
8 whether anything prohibits that or says that Congress has  
9 already spoken to this particular issue. And that is what  
12:54:44 10 was driving the Fifth Circuit in the DAPA decision, and  
11 that is not the same here.

12                   The Fifth Circuit actually held that even  
13 though DAPA did not confer the full panoply of benefits  
14 that a visa would give, DAPA would allow illegal aliens to  
12:55:00 15 receive the benefits of lawful presence solely on account  
16 of their children's immigration status without complying  
17 with any of the requirements that Congress has deliberately  
18 imposed. So that's another limitation.

19                   THE COURT: That's -- that's true of the DACA  
12:55:12 20 population except for the children part, isn't it?

21                   MS. WAINER APTER: I'm sorry. Can you say that  
22 again, Your Honor?

23                   THE COURT: Well, I mean, Congress has  
24 opposed -- by who they've deemed as admissible into the  
12:55:23 25 United States, haven't they imposed limits, and DACA avoids

1 that? It gives legal presence to every DACA person.

2 MS. WAINER APTER: Well, so the definition of  
3 "unlawful presence" in the INA also recognizes that the  
4 Attorney General, now the Secretary of the Department of  
12:55:42 5 Homeland Security, does have the power to grant lawful  
6 presence. And that's not the same as lawful status, and so  
7 no one here is claiming that DHS can grant lawful status in  
8 a way that would constitute a defense to removal or in a  
9 way that would constitute a substantive right to remain in  
12:55:57 10 the United States; but the way that the statute defines a  
11 period of unlawful presence is a period that has not been  
12 authorized by the Attorney General. Here, there is a  
13 period that has been authorized by, in this case, the  
14 Secretary of DHS.

12:56:12 15 Sorry. And then just to go back to the  
16 third limitation. So the first one is, cannot conflict  
17 with any of Congress's priorities; the second one is,  
18 cannot address a population that Congress has explicitly  
19 provided for; and then, as Ms. Perales already discussed,  
12:56:26 20 the third is just sheer number.

21 And so the Fifth Circuit just said  
22 Congress does not -- did not grant to the agency the  
23 discretionary authority to deal with 4.5 million people.  
24 And I want to suggest, Your Honor, that it's not just 4.5  
12:56:44 25 million on one side and --

1 THE COURT: Well, where did it give them  
2 discretion to deal with a million people?

3 MS. WAINER APTER: So I think from there, it's  
4 helpful to look back to the Family Fairness policy, which,  
12:56:54 5 as we said, Congress envisioned would apply to 1.5 million  
6 people, even though in the end, 1.5 million people did not  
7 apply. And Texas asserts for the first time in its reply  
8 that the Family Fairness policy is actually not relevant  
9 because it was explicitly authorized by statute. That is  
12:57:12 10 not true, though. The Voluntary Departure statute that  
11 existed at the time, and that's 8 U.S.C. 1254e from 1988  
12 and 1990, quoted -- it's not quoted, but it's cited in  
13 Texas's reply. So at the time that statute provided, and I  
14 quote, "The Attorney General may, in his discretion, permit  
12:57:33 15 any alien under deportation proceedings to depart  
16 voluntarily from the United States at his own expense in  
17 lieu of deportation."

18 So that statute does not authorize the  
19 Family Fairness policy in the way that Texas implies or  
12:57:48 20 states that it does in the reply. First of all, as you  
21 heard, it applies only to persons in deportation  
22 proceedings, which the Family Fairness policy did not. It  
23 also says nothing about forbearing removal for a period of  
24 years or work authorization, both of which the Family  
12:58:03 25 Fairness policy specifically provided for.

1 And Texas, here, has actually stated that  
2 the Family Fairness policy did not include work  
3 authorization, but that is not true. The McNary memo,  
4 which can be found in Texas's appendix at Page 249 to 251,  
5 specifically mentions work authorization.

12:58:18

6 Moving on to the procedural question as to  
7 whether the Napolitano memo required notice-and-comment  
8 rulemaking, there are just a few points that I wanted to  
9 make here.

12:58:34

10 As Ms. Perales discussed, the extrinsic  
11 evidence that this Court relied on last time, which was the  
12 declaration of Kenneth Palinkas, DAPA's -- DACA's -- I'm  
13 sorry -- standard operating procedures and the denial rate  
14 could not be more different here. As to Mr. Palinkas, here  
15 he sat for a deposition. He testified at his deposition  
16 that he has no personal knowledge of DACA adjudication and  
17 a strong personal bias against DACA.

12:58:52

18 As to the standard operating procedures,  
19 internal DHS documents that were produced during discovery  
20 show that service center adjudicators do exercise  
21 discretion on a case-by-case basis. So, for example, a  
22 June 2015 e-mail explained that the Texas Service Center,  
23 and I quote, (Reading), Now denies significantly more DACA  
24 cases, based on our view of discretionary denials shifting.  
25 Every case is different, so we have to review the totality

12:59:09

12:59:27

1 of the circumstances of each one. For whatever it's worth,  
2 the supervisors and I also like to jokingly say that our  
3 standard is whether or not you would want to live next door  
4 to the person. That shows that discretion is being  
5 exercised.

12:59:44

6 And as to the denial rates this Court  
7 previously relied on, it was approximately a foreperson of  
8 rate of accepted applications that had been denied. Since  
9 then, the denial rates have shot up. So it was

12:59:58

10 approximately a 17 percent denial rate in 2014, 22 percent  
11 in 2015, 15 percent in 2016, 20 percent in 2017. Overall,  
12 the number is now, I believe, 8.4 percent, except that --

13 THE COURT: Let me -- I'm not fussing with you  
14 about the numbers, but I didn't rely on the rate,

01:00:20

15 necessarily, in the last case. I denied on the fact the  
16 Government told me that they had never denied a DACA -- I  
17 mean, sorry -- DAPA -- a DACA application that met the  
18 criteria set out by -- by the Secretary. And so no  
19 discretion -- if they -- so it was not -- there was no

01:00:43

20 individual discretion being exercised by the people.

21 Now, that was a different -- that's a  
22 different record than we have here, and I'm going to judge  
23 this solely on this record, I will assure you of that.

24 MS. WAINER APTER: So thank you, Your Honor.

01:00:56

25 And moving to the record that we have here, just to point

1 out, in its response to the third set of discovery requests  
2 here, the federal defendants wrote, and I quote, that they  
3 are aware of several initial DACA requests that were denied  
4 because the requester either made false statements or  
01:01:12 5 committed fraud in another immigration or nonimmigration  
6 context, despite the requester meeting the DACA guidelines  
7 outlined in the bulleted points on the first page of the  
8 Napolitano memo.

9                   And I think that the point there is that  
01:01:27 10 it wasn't -- it was -- it was not a denial because the  
11 person had committed fraud in this application. It was a  
12 denial because the adjudicator found that at some point in  
13 the past, in some other context, the person had committed  
14 fraud. And that is an example of discretionary denial  
01:01:43 15 where the person does meet all of the requirements but it  
16 has still been denied.

17                   And, actually, my last point when it comes  
18 to discretionary denials is in their reply, plaintiffs  
19 asserted for the first time, and Mr. Disher put up here on  
01:01:56 20 the screen, that the USCIS Texas Service Center processed  
21 seven thousand six hundred and two hundred and fifty-nine  
22 [sic] DACA applications from August 2012 until June of  
23 2018, and yet just confirmed as of May that not a single  
24 one of those applications was denied for discretionary  
01:02:18 25 reasons.

01:02:30

1 And they block-quoted from an e-mail --  
2 this is in their reply brief at Page 23. They block-quoted  
3 from this e-mail from Ms. Tyronda Lee, and that's what they  
4 put on the screen. But Texas did not put the e-mail in the  
5 chain that came immediately before that one.

01:02:49

6 Sorry. I'll start down here. So this  
7 e-mail is the one that came originally before the  
8 responsive e-mail by Tyronda Lee, and this e-mail says --  
9 and you can see at the bottom here that it was sent at 8:00  
10 a.m. So this e-mail says that the Texas Service Center was  
11 given a total of three hours to respond to this request  
12 from the federal defendants. The request was had there  
13 been any of these purely discretionary denials when all the  
14 factors were met. According to Ms. Tracy Renaud from the  
15 federal defendants who submitted an affidavit in this case,  
16 the federal defendants are not tracking the reason for  
17 denials and it would, in fact, take thousands of hours to  
18 go through and figure out whether there have been any  
19 discretionary denials.

01:03:08

01:03:22

20 So the three hours that the Texas Service  
21 Center was given in this case simply was not sufficient for  
22 them to actually go through the paper files and search for  
23 discretionary denials.

01:03:33

24 And then I'm switching to the top part of  
25 the e-mail. Here, the response from the Texas Service



1 Center is, Actually, we haven't been processing a single  
2 DACA initial or renewal application in over two years.

3                   So the information that Texas put up on  
4 the screen from Ms. Lee says nothing about denials since  
01:03:51 5 2016. And so it is very possible that at the Texas Service  
6 Center, since 2016, there have been many -- or I'm sorry --  
7 obviously, not at the Texas Service Center because they're  
8 not adjudicating DACA applications anymore; but at the  
9 service centers that have been adjudicating them since  
01:04:08 10 2016, that there have been these discretionary denials.

11 And as the Federal Government's witness explains, it would  
12 take, according to the Federal Government, thousands of  
13 hours to go through the papers and figure it out.

14                   And this was raised, just so you know, for  
01:04:22 15 the first time in Texas's reply, and so we plan to file  
16 this in the record later today, but I have copies if the  
17 Court would like, as well.

18                   THE COURT: Why don't you leave them with the  
19 case manager.

01:04:31 20                   MS. WAINER APTER: Okay. Will do.

21                   And then just to move on to the balance of  
22 the equities and the public interest factors just for a  
23 minute.

24                   Sorry about that.

01:04:47 25                   So when it comes to the balance of the

1 equities, as Ms. Perales mentioned, this Court recognized  
2 last time that the balance of the equities were that DAPA  
3 was not the status quo and that if DAPA were permitted to  
4 go into effect, it would be very difficult to unscramble  
01:05:05 5 the egg. Here, as we said, that is the opposite. And one  
6 example suffices here as to what we're talking about for  
7 individual DACA grantees.

8                   Joanna Costa explained in her deposition  
9 and in her declaration that DACA has been the platform on  
01:05:23 10 which she has built her career. Without DACA, her life  
11 would drastically change in ways big and small. She would  
12 lose her job; she would have no source of income; and she  
13 would be unable to support the life she had worked so hard  
14 to build. She would also lose the ability to do everyday  
01:05:39 15 things that people take for granted, including drive,  
16 purchase Sudafed at a CVS -- I think she says "Mucinex" --  
17 and enter a public building, all of which require a person  
18 to show ID.

19                   And when it comes to the public-interest  
01:05:55 20 factors, I think the last thing that's worth mentioning is  
21 in the DAPA litigation, there were four amicus bring briefs  
22 that were submitted in support of Plaintiff State's motion  
23 for a PI and four amicus briefs that were submitted in  
24 opposition to the motion for PI.

01:06:10 25                   I think, as you already noted, Your Honor,

1 here, there are 15 amicus briefs that were submitted  
2 opposing plaintiffs' motion for a PI, and they're on behalf  
3 of 19 states, 114 companies, 104 religious organizations,  
4 71 American institutions of higher education, 28  
01:06:28 5 legal-services organizations, 71 current and former  
6 prosecutors, and a whole host of others. There is a total  
7 of one amicus brief that was filed supporting plaintiffs'  
8 motion for a preliminary injunction, and that was on behalf  
9 of six members of Congress.

01:06:41 10 As these amicus briefs explain, the public  
11 would be harmed by an injunction in a way that just did not  
12 apply to the DAPA litigation, and this Court should deny  
13 the motion.

14 THE COURT: All right. Thank you, Ms. Apter.  
01:06:56 15 Mr. Disher, just a few minutes.

16 MR. DISHER: Yes, Your Honor. I'll be brief.

17 First, I want to begin where New Jersey  
18 left off, which is the procedural APA claim. Again, New  
19 Jersey continues to focus on whether there is any evidence  
01:07:18 20 of truly discretionary denials. Our contention is that  
21 there is not; however, even if there were, that still does  
22 not satisfy the procedural APA claim, because DACA granted  
23 substantive benefits; therefore, it had to go through  
24 notice-and-comment rulemaking, according to the APA.

01:07:37 25 Moving in reverse --

1 THE COURT: But even if I find that the  
2 applicants are truly screened discretionarily on a  
3 case-by-case basis, so I -- I totally go with the  
4 intervenors, it still has to go through notice and comment?

01:07:56

5 MR. DISHER: Yes, that is correct, Your Honor,  
6 because it confers substantive rights and benefits;  
7 therefore, it has to go through notice-and-comment  
8 rulemaking.

01:08:04

9 And one additional thing to point out on  
10 the discretionary piece, this is a slide, Slide Number 25,  
11 from MALDEF's appendix. This is Slide 25 of a 189-slide,  
12 quote, refresher course for how DACA applications go  
13 through the review for criminality, public safety, and  
14 national security.

01:08:27

15 I would contend, Your Honor, that in this  
16 flow chart, there is no room for discretion of individual  
17 Immigration Service officers; however, again, as you -- as  
18 you asked, even if there was discretion, that does not cure  
19 the procedural violation of the APA.

01:08:44

20 On the substantive violation, there has  
21 been a lot of talk of the Family Fairness Act. That is not  
22 a new argument. That exact same argument was made in the  
23 DAPA and expanded DACA case, and that exact argument was  
24 rejected by the Fifth Circuit. So that in no way lends  
25 additional support to the legality of DACA in this case.

01:09:00

1 Then, lastly, Your Honor, just to respond  
2 to a few things that the DACA intervenors argued, first,  
3 they said that harm here depends on imaginary leaps. That  
4 is, in fact, not true. Harm has been established here by  
01:09:22 5 our witnesses and by their witnesses, and it is much more  
6 certain than the harm at issue in *Massachusetts vs. EPA*.

7 And then they go on to make what I think  
8 is kind of a remarkable argument, is that the Executive  
9 action in this context is not reviewable because it is in  
01:09:41 10 the immigration field. I don't think that they are really  
11 arguing that every action the Executive Branch may take in  
12 the immigration context is unreviewable by a court, and  
13 indeed no court has found that DACA or the attempted  
14 rescission of DACA is an unreviewable action.

01:10:00 15 Then as to *Trump v. Hawaii*, as we've  
16 pointed out in our briefing, there is a specific statute  
17 that could have not granted broader discretion to the  
18 Executive Branch to act pursuant to that statute, and yet  
19 the Supreme Court still made clear, even with that most  
01:10:15 20 broad grant of discretion, the Executive could not exercise  
21 that discretion in a way that violated a Congressional  
22 statute. DACA here does not have a similar statute  
23 granting the Executive discretion. It does indeed violate  
24 many of the Congressional statutes.

01:10:35 25 On the delay point, Your Honor, litigation

1 involves a number of weighing of costs and benefits, and  
2 litigants are not required to wage a multilawsuit front  
3 against issues that are already being adjudicated in a  
4 lawsuit that was filed in 2014. And, again, as soon as  
01:10:55 5 that lawsuit came back to this Court, we attempted to -- or  
6 we -- we threatened to add this very claim, but the  
7 reason -- only reason we didn't is because we thought DACA  
8 was going to go away; and now in 15 days, we know that  
9 that's not going to happen, absent a ruling from this  
01:11:10 10 Court.

11 On -- in terms of deferred action and  
12 the -- the outer limits and -- and contrasting that to some  
13 of the smaller uses of deferred action, what the  
14 intervenors were talking about is, of course, deferred  
01:11:28 15 action in the context of the Reno case. And in that case,  
16 the Supreme Court recognized the Executive does have  
17 authority to grant deferred action on individual basis, but  
18 that is different than the deferred action we're talking  
19 about here, not only in terms of the scope but also in  
01:11:42 20 terms of the rights and benefits that go along with  
21 deferred action. That type of deferred action did not come  
22 with lawful presence and, importantly, did not come with  
23 work authorization.

24 And then finally, Your Honor, in terms of  
01:12:06 25 the status quo, as we sit here today, there is no

01:12:26

1 injunction preventing -- or rather, there is no injunction  
2 that requires DHS to grant new DACA applications and new  
3 applications of advance parole; however, we know in 15  
4 days, that's going to change subject to the ruling from  
5 this Court.

01:12:38

6 In 15 days, new applications will be  
7 granted and new applications for advance parole will be  
8 granted, which nobody disputes, gives a pathway to  
9 citizenship to some unlawfully present aliens that they  
10 would not have but for DACA; therefore, Your Honor, we're  
11 asking for preliminary injunction before August 23rd in  
12 order to prevent those harms.

13 Thank you.

14 THE COURT: Thank you, Mr. Disher.

01:12:50

15 All right, counsel, here's what I'd like.  
16 Don't bury me with a bunch of briefs. You've already done  
17 that, and I've read your exhibits and read the briefs.

01:13:11

18 I do want -- and you can -- I want it  
19 limited to five pages. I want a brief that assumes,  
20 hypothetically, that I think there is discretion being  
21 given. Okay? That I -- I'm sorry. Assume hypothetically  
22 I'm accepting the Intervenor's argument that the  
23 applications are being given discretion or discretion is  
24 being used, can there still be a violation of the

01:13:36

25 procedural APA? And either tell me how or tell me no way.

1 And I'd like those by close of business Monday.

2 I just -- my weekend was going to be bad;  
3 I wanted yours to be bad as well.

4 (Laughter.)

01:14:01

5 THE COURT: And if you will, go ahead and file  
6 them; but if you will, send courtesy copies here to  
7 Houston.

01:14:15

8 All right. Thank you for your  
9 participation. Attorney Grewal, Attorney Paxton, thank  
10 y'all for being here.

01:14:28

11 MS. PERALES: I'm so -- I'm so sorry, Your  
12 Honor. We had two housekeeping matters regarding pending  
13 motions. One was an unopposed motion to withdraw an  
14 inadvertently filed exhibit, and the other are  
15 cross-motions to exclude exhibits. I just wanted to get  
16 that on the Court's radar, not necessarily to ask time to  
17 argue today.

01:14:38

18 THE COURT: Is there any real problem with the  
19 exhibit that's been filed? I know it -- it was contrary to  
20 the agreement or maybe my order but, I mean, is there  
21 anything -- a problem with that exhibit?

22 MR. DISHER: No. Not with us, Your Honor.

23 THE COURT: Anybody else object to it?

24 MR. ROBINS: No.

01:14:47

25 THE COURT: You want to withdraw it or leave



1 it?

2 MS. PERALES: The exhibit that we're seeking to  
3 withdraw, we would like to withdraw that exhibit.

4 THE COURT: Okay.

01:14:54

5 MS. PERALES: There is also a pending  
6 cross-motions for exclusion of evidence between Texas and  
7 the Perez Defendant intervenors.

8 THE COURT: On?

9 MS. PERALES: That is on the Court's desk.

01:15:04

10 THE COURT: Tell me -- remind me what that's  
11 about.

12 MS. PERALES: We both have declarations from  
13 other cases that we filed without listing those declarants  
14 as witnesses or doing discovery. We each have that. We  
15 have each moved to exclude the others, and they are in the  
16 same position.

01:15:23

17 THE COURT: Perfect. I'm going -- let me take  
18 a look at those.

19 MS. PERALES: Thank you, Your Honor.

01:15:34

20 THE COURT: I can probably -- I can almost  
21 promise you, though, the good for the goose, good for the  
22 gander rule is going to control.

23 MS. PERALES: Thank you.

24 THE COURT: All right. Thank y'all.

01:15:42

25 COURT SECURITY OFFICER: All rise.

1 (Concluded at 1:15 p.m.)

2 COURT REPORTER'S CERTIFICATE

3

4 I, Kathleen K. Miller, certify that the foregoing is a  
5 correct transcript from the record of proceedings in the  
6 above-entitled matter.

7

8

9 DATE: August 9, 2018

/s/

Kathleen K. Miller, RPR, RMR, CRR

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